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NORTH CAROLINA REPORTS

VOL. 157.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

[v.157]

FALL TERM, 1911

(IN PART).

BY

ROBERT C. STRONG,

STATE REPORTER.

RALEIGH:
E. M. UZZELL & CO., STATE PRINTERS AND BINDERS.
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OF THE

SUPREME COURT OF NORTH CAROLINA,

FALL TERM, 1911.

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WALTER CLARK.

ASSOCIATE JUSTICES:

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GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

T. W. BICKETT.

ASSISTANT ATTORNEY-GENERAL:

G. L. JONES.[1]

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.[2]

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108129

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA,

FALL TERMS, 1911.

Name.	*District.*	*County.*
Stephen G. Bragaw	First	Beaufort.
Robert B. Peebles	Second	Northampton.
Harry W. Whedbee	Third	Pitt.
Charles M. Cooke	Fourth	Franklin.
Oliver H. Allen	Fifth	Lenoir.
F. A. Daniels	Sixth	Wayne.
C. C. Lyon	Seventh	Bladen.
W. J. Adams	Eighth	Moore.
Howard A. Foushee	Ninth	Durham.
Benjamin F. Long	Tenth	Iredell.
Henry P. Lane	Eleventh	Rockingham.
James L. Webb	Twelfth	Cleveland.
E. B. Cline	Thirteenth	Catawba.
M. H. Justice	Fourteenth	Rutherford.
Frank Carter	Fifteenth	Buncombe.
Garland S. Ferguson	Sixteenth	Haywood.

SOLICITORS.

Name.	*District.*	*County.*
J. C. B. Ehringhaus	First	Pasquotank.
John H. Kerr	Second	Warren.
Charles L. Abernethy	Third	Carteret.
Richard G. Allsbrook	Fourth	Edgecombe.
Henry E. Shaw	Fifth	Lenoir.
Herbert E. Norris	Sixth	Wake.
N. A. Sinclair	Seventh	Cumberland.
A. M. Stack	Eighth	Union.
S. M. Gattis	Ninth	Orange.
William C. Hammer	Tenth	Randolph.
S. P. Graves	Eleventh	Surry.
George W. Wilson	Twelfth	Gaston.
Frank A. Linney	Thirteenth	Watauga.
A. Hall Johnston	Fourteenth	McDowell.
Robert R. Reynolds	Fifteenth	Buncombe.
Felix E. Alley	Sixteenth	Jackson.

LICENSED ATTORNEYS.

The attorneys licensed Spring Term, 1912, will be found in the forthcoming volume, where the cases for that term will be printed.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1912.

SUPREME COURT.

The Supreme Court of North Carolina meets in the City of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1912.	
First District	August	27
Second District	September	3
Third District	September	10
Fourth District	September	17
Fifth District	September	24
Sixth District	October	1
Seventh District	October	8
Eighth District	October	15
Ninth District	October	22
Tenth District	October	29
Eleventh District	November	5
Twelfth District	November	12
Thirteenth District	November	19
Fourteenth District	November	26
Fifteenth District	December	3
Sixteenth District	December	10

SUPERIOR COURTS, FALL TERMS, 1912.

FALL TERMS DATE FROM JULY 1 TO DECEMBER 31.
SPRING TERMS DATE FROM JANUARY 1 TO JUNE 30.

The parenthesis numeral following the date of a term indicates the number of weeks during which court may hold.

FIRST JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Lane.*
Pasquotank—Sept. 16 (1).
Beaufort—Oct. 14 (2); †Nov. 26 (2); *Dec. 9 (1).
Currituck—Sept. 2 (1).
Camden—Sept. 9 (1).
Perquimans—Sept. 23 (1).
Chowan—Sept. 30 (1).
Gates—Oct. 7 (1).
Washington—Oct. 28 (1).
Tyrrell—Nov. 4 (1).
Dare—Nov. 11 (1).
Hyde—Nov. 18 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Webb.*
Halifax—Aug. 19 (2); Nov. 25 (2).
Warren—Sept. 16 (2).
Bertie—Sept. 9 (1); Nov. 11 (2).
Hertford—Oct. 14 (2).
Northampton—‡Aug. 5 (1); Oct. 28 (2).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Cline.*
Pitt—*Aug. 19 (1); †Aug. 26 (1); †Sept. 16 (2); *Nov. 4 (1); Nov. 11 (1); *Dec. 9 (1).
Craven—*Sept. 30 (1); †Oct. 7 (1); †Nov. 18 (2).
Greene—Sept. 2 (1); Dec. 2 (1).
Carteret—Oct. 14 (1).
Jones—Oct. 28 (1).
Pamlico—Oct. 21 (1).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Justice.*
Franklin—*Aug. 19 (1); †Oct. 14 (2).
Wilson—Sept. 2 (1); †Nov. 11 (2); *Dec. 16 (1).
Vance—Sept. 30 (2).
Edgecombe—Sept. 9 (1); †Oct. 28 (2).
Nash—*Aug. 26 (1); †Nov. 25 (1); *Dec. 2 (1).
Martin—Sept. 16 (2); Dec. 9 (1).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Carter.*
Lenoir—*Aug. 19 (1); †Nov. 4 (2); *Dec. 9 (1).
Pender—Sept. 9 (2).
New Hanover—July 22 (2); Sept. 23 (1); †Sept. 30 (2); *Dec. (1).
Sampson—July 8 (1); †Aug. 5 (2); Oct. 21 (2).
Duplin—*July 1 (1); †Aug. 26 (2); Nov. 18 (2).
Onslow—*July 15 (1); Oct. 14 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Ferguson.*
Wake—July 8 (2); Sept. 23 (2); †Oct. 21 (3).
Johnston—Sept. 9 (2); Dec. 9 (2).
Wayne—Aug. 19 (2); Oct. 7 (2); Nov. 25 (2).
Harnett—Sept. 2 (1); †Nov. 11 (2).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Bragaw.*
Cumberland—*Aug. 26 (1); †Oct. 21 (2); *Nov. 18 (1).
Bladen—†July 29 (1); *Oct. 14 (1).
Robeson—July 1 (2); *Sept. 9 (1); †Oct. 7 (1); Nov. 4 (2); †Dec. 2 (2).
Columbus—July 15 (2); Sept. 2 (1); Nov. 25 (1).
Brunswick—†Aug. 5 (1); Sept. 30 (1).
Hoke—Terms to be set by the Governor.

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Peebles.*
Richmond—July 8 (1); *Sept. 2 (1); †Sept. 23 (1); †Dec. 2 (1).
Anson—*Sept. 9 (1); †Sept. 30 (2).
Moore—*Aug. 12 (1); †Sept. 16 (1); Dec. 9 (1).
Union—*July 29 (1); †Aug. 19 (2); Oct. 28 (2).
Chatham—Aug. 5 (1); Nov. 11 (1).
Scotland—†Oct. 14 (2); †Nov. 25 (1).
Lee—July 15 (2); Nov. 18 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Whedbee.*
Guilford—†Aug. 12 (2); *Sept. 16 (1); †Oct. 21 (2); *Dec. 9 (1).
Durham—*Aug. 26 (1); †Sept. 30 (2); *Dec. 2 (1).
Granville—July 29 (1); Nov. 18 (2).
Alamance—*Sept. 2 (1); †Sept. 9 (1); *Nov. 4 (1).
Orange—Oct. 14 (1).
Person—Aug. 5 (1); Nov. 11 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1912—*Judge Cooke.*
Stanly—July 8 (1); †Sept. 9 (1).
Montgomery—*July 1 (1); †Sept. 16 (2).
Iredell—July 29 (2); Oct. 28 (2).
Rowan—Aug. 26 (2); Nov. 18 (2).
Davidson—Aug. 12 (2); †Nov. 11 (1).
Randolph—July 15 (2); Dec. 2 (2).
Davie—Sept. 30 (2).
Yadkin—Oct. 14 (2).

---

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

ELEVENTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge O. H. Allen.*
Forsyth—*July 22 (1); †Sept. 9 (2); ‡Oct. 7 (1); †Dec. 2 (2).
Surry—†Aug. 26 (2); Nov. 18 (2).
Rockingham—*July 29 (1); Nov. 4 (2).
Alleghany—Aug. 19 (1).
Ashe—July 8 (2); Oct. 21 (2).
Caswell—Oct. 14 (1).
Stokes—*Sept. 23 (1); †Sept. 30 (1).

TWELFTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge Daniels.*
Mecklenburg—†July 15 (2); *Aug. 12 (2); *Sept. 23 (1); †Sept. 30 (3); †Nov. 25 (1); ‡Dec. 2 (1).
Cabarrus—Aug. 26 (1); Oct. 21 (2).
Gaston—Sept. 9 (2); Nov. 18 (1).
Cleveland—July 29 (2); Nov. 4 (2).
Lincoln—Sept. 2 (1); Dec. 9 (1).

THIRTEENTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge Lyon.*
Wilkes—Aug. 5 (2); †Sept. 30 (2).
Catawba—July 8 (2); Oct. 28 (2).
Alexander—Sept. 16 (2).
Caldwell—Aug. 19 (2); †Nov. 25 (2).
Mitchell—†July 22 (2); Nov. 11 (2).
Watauga—Sept. 2 (2).
Avery—Oct. 14 (2).

FOURTEENTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge W. J. Adams.*
McDowell—July 22 (2); Sept. 16 (2).
Rutherford—†Aug. 19 (2); Oct. 28 (2).
Henderson—*Sept. 30 (2); ‡Nov. 11 (2).
Burke—Aug. 5 (2); †Dec. 2 (2).
Yancey—Sept. 2 (2).
Polk—Oct. 14 (2).

FIFTEENTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge Foushee.*
Madison—Sept. 9 (2); †Oct. 14 (1).
Buncombe—†July 22 (3); Aug. 12 (2); †Sept. 23 (3); Oct. 21 (2); †Nov. 11 (4).
Transylvania—Aug. 26 (2); Nov. 4 (1).

SIXTEENTH JUDICIAL DISTRICT.

Fall Term, 1912—*Judge Long.*
Haywood—July 8 (2); Sept. 23 (2).
Jackson—Oct. 7 (2).
Swain—July 22 (2); Oct. 21 (2).
Graham—Sept. 2 (2).
Cherokee—Aug. 5 (2); Nov. 4 (2).
Clay—Sept. 16 (1).
Macon—Aug. 19 (2); Nov. 18 (2).

---

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

Compiled from the Court Calendar of A. B. Andrews, Jr., of the Raleigh Bar.

UNITED STATES COURTS FOR NORTH CAROLINA.

DISTRICT COURTS.

Eastern District—Henry G. Connor, Judge, Wilson.

Western District—James E. Boyd, Judge, Greensboro.

EASTERN DISTRICT.

Terms.—District terms are held at the time and place, as follows:

Raleigh, fourth Monday after the fourth Monday in April and October. H. L. Grant, Clerk; George L. Tonnoffski, Deputy Clerk.

Wilmington, second Monday after the fourth Monday in April and October. Samuel P. Collier, Deputy Clerk, Wilmington.

New Bern, fourth Monday in April and October. George Green, Deputy Clerk, New Bern.

Elizabeth City, second Monday in April and October. Harry T. Greenleaf, Jr., Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

OFFICERS.

H. F. Seawell, United States District Attorney, Carthage, N. C.

I. M. Meekins, Assistant United States District Attorney, Elizabeth City.

Claudius Dockery, United States Marshal, Raleigh.

H. L. Grant, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Goldsboro.

George L. Tonnoffski, Deputy Clerk, Raleigh.

WESTERN DISTRICT.

Terms.—District terms are held at the time and place, as follows:

Greensboro, first Monday in April and October. J. M. Milliken, Clerk, Greensboro.

Statesville, third Monday in April and October. H. C. Cowles, Deputy Clerk, Statesville.

Asheville, first Monday in May and November. W. S. Hyams, Deputy Clerk, Asheville.

Charlotte, second Monday in June and December. H. C. Cowles, Deputy Clerk, Statesville.

(Terms of Court for Wilkesboro and Salisbury not put down as yet in the official record of the Department of Justice.)

OFFICERS.

A. E. Holton, United States District Attorney, Winston.

A. L. Coble, Assistant United States District Attorney, Statesville.

William E. Logan, United States Marshal, Greensboro.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1911.

JAMES MAYNARD ET AL. v. A. S. SEARS.

(Filed 15 November, 1911.)

1. **Wills—Devises—Defeasible Fee—Deeds and Conveyances—Purchase.**

A testator bequeathed certain personalty to several named beneficiaries, as to each specifying, "to him and his lawful heirs begotten of his body, dying without such, to return" to certain designated persons "or their lawful heirs"; and also devised and bequeathed "the balance of my land and negroes to be equally divided between" J., C., and T., with provision that if "they all should die without such heirs, to return to my brother and sister": *Held*, J., C., and T. took a defeasible fee in the land, determinable at their death without lawful issue, and could convey no greater interest therein.

2. **Wills—Devises—Defeasible Fee—Life Estate—Limitations of Actions.**

A devise of lands terminable upon the death of the devisee "without lawful issue" is a life estate upon the happening of the contingent defeasible event, and the statute of limitations does not begin to run against the remainderman in fee until the life estate falls in.

3. **Wills—Devises—Defeasible Fee—Devisor's Title—Identification—Evidence.**

In an action brought by the heir at law of the remainderman to recover lands devised to his ancestor, evidence is sufficient as tending to show that the title to the lands in dispute was in the devisor, when the will itself shows he claimed the fee, and the testimony of a witness was that when he first knew the lands he was about five or six years old and the devisor cultivated them, and that the description of the lands in the will embraced the *locus in quo*, which he identified and described, and that upon the death of the devisor the devisee took possession of and cultivated the land, and stated that his title was "only good for life," with other evidence that there was a defect of the fee-simple title in him.

4. **Evidence—Lands—Acts of Ownership—Age of Witness—Weight of Evidence—Questions for Jury.**

When a witness, testifying as to acts of ownership of one having claimed the title to lands in dispute, says that at the time he was five or six years old, the weight of his testimony is for the jury to determine.

5. **Nonsuit—Evidence—Questions for Jury.**

In this case there was sufficient evidence to be submitted to the jury upon the question as to whether the plaintiffs were the heirs at law of J. S., under whom they claimed certain lands, the title to which was in dispute, and therefore a motion to nonsuit upon the evidence on that ground was improperly sustained.

APPEAL by plaintiff from *Whedbee, J.,* at February Term, 1911, of WAKE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Aycock & Winston and Peele & Maynard for plaintiff.
R. N. Simms for defendant.

CLARK, C. J. This is an action to recover 100 acres of land. Berry Surls died in 1842, having executed his will as follows:

In the name of God, amen. I, Berry Surls, of county of Wake, being of sound and perfect mind and memory, blessed be God, do this 10th day of February, 1842, make and publish this my last will and testament in manner following: That is to say, First, I give and bequeath to John Pollard one negro girl by the name of Jane, to him and his lawful heirs begotten of his body; dying without such, to return to Caswell Pollard and Thomas Slaughter, or their lawful heirs begotten of their body. Item the second: I give Caswell Pollard one negro girl by the name of Hannah, to him and his lawful heirs begotten of his body; dying without such, to return as above directed. Thirdly, I give to Thomas Slaughter one negro girl by the name of Pat, to him and his lawful heirs begotten of his body; dying without such, to return to John and Caswell Pollard, or their lawful heirs begotten of their body; and the balance of my land and negroes to be equally divided between John Pollard, Caswell Pollard, and Thomas Slaughter, after paying all my just debts, with the exception of Buck. It is my desire that he be sold to a speculator; and it is my desire that all my stock of all kinds be sold and equally divided between them as above stated. Also, my money and notes to be divided in the manner above stated equally between my three sons which are named in this will. It is my desire that if they all should die without such heirs, to return to my brother and sister, or their lawful heirs. I also appoint and ordain my worthy friend, Henry Williams, my executor to this my last will and testament. In testimony whereof I have hereunto set my hand and affixed my seal, in the presence of Dempsey Sorrell and John Brown, this 10th day of February, 1842.

His
BERRY × SURLS.
mark.

The plaintiffs claim that they are the heirs at law of John Surls, who was a brother of Berry Surls, and offered evidence thereof. Berry Surls left no legitimate children. Soon after he died his three devisees, John and Caswell Pollard and Thomas Slaughter, took possession of the land sued for and cultivated the same, which they undertook to convey on 4 October, 1851, to Bartlett Sears, who took possession of the land and held it till his death. It was sold 10 February, 1873, to pay the debts of Bartlett Sears. It was purchased by W. H. Crabtree, who took possession. The deed to him recites that the land is the same as that sold by John Pollard, Caswell Pollard, and Thomas Slaughter to Bartlett Sears by aforesaid deed 4 October, 1851. On 20 November, 1878, Crabtree sold the land, together with adjoining land, making a tract of 282 acres, to S. R. Horne, who remained in possession till 24 April, 1897, when he conveyed the land to the defendant Sears. The last one of the three devisees named in the will of Berry Surls, to wit, Caswell Pollard, died in February, 1908. This action was brought the following year.

The plaintiffs correctly contend that under the will of Berry Surls, John and Caswell Pollard and Thomas Slaughter took a defeasible fee in said 100 acres, and that their deed to Bartlett Sears conveyed only such estate, and that the successive mesne conveyances down to the defendant Sears conveyed no more than such defeasible fee in the land. The statute of limitations did not begin to run against the plaintiffs, if heirs at law of John Surls, till the death of Caswell Pollard in 1908. Only one of the three devisees married, and the plaintiffs offered evidence that he left no children.

The statute of limitations does not run against the remainderman in favor of the grantee of the life tenant until the life estate falls in. *Hauser v. Craft,* 134 N. C., 319; *Cox v. Jernigan,* 154 N. C., 584; *Staton v. Mullis,* 92 N. C., 519.

The defendant contends that the evidence does not show that the land ever belonged to Berry Surls, nor that the plaintiffs are the heirs at law of John Surls, nor that Thomas Slaughter and John Pollard are yet dead, and that they did not leave children.

There was evidence upon all these propositions, but the defendant claimed that it was not sufficient to be submitted to the jury to prove these contentions of the plaintiffs. The judge having directed a nonsuit, the evidence must be taken in the light of the most favorable inferences which can be drawn from it.

It is manifest from the entire will that the testator intended that each of the devisees should have a fee simple, defeasible upon failure of heirs of his body. He makes this direction as to the slaves, his money and notes, and directs "the balance of the land and negroes be equally divided between the three," adding that it was his desire "that if they all should die without such heirs, to return to my brother and sister or their lawful heirs." The testator applied the significant word "return" to everything.

The witness Markham testified that when he first knew the land, Berry Surls was cultivating it; that the witness was then five or six years old; that he saw the negro Buck named in the deed at work on the land, and that the description of the 100 acres in the will from the three devisees to Sears embraced the 100 acres of land which he identified and described. He says that 50 acres were in cultivation when he first knew the land; that he remembers that a man was found dead on the tract, and that Berry Surls had a grave dug on the land to bury him; that after the death of Berry Surls the three devisees took possession of the land and cultivated it. That Berry Surls lived on the land; that he saw him in the house he lived in, saw him two or three times, and saw him walking in the fields where Buck and Beck mentioned in his will were working. It is true that the witness states that he was then only five or six years of age. But the weight of his testimony was a matter for the jury. A son of Bartlett G. Sears, former owner of the land, fully identified the 100 acres. The witness Markham testified that Bartlett Sears while in possession cut down the timber on the land and stated that his title was only good for the lifetime of the three devisees named in the will. The witness Sears also stated that he was present when the land was sold to pay his father's debts, and it was stated at the time that the title was in dispute and the land brought only $160 or $170, whereas it was really worth $500 or $600. The witness Byrd testified that he heard Horne, the defendant's grantor, say that he told the defendant that there was a defect in the title of the 100-acre tract. The will of Berry Surls shows that he claimed to own this land in fee simple.

There is also evidence sufficient, if believed by the jury, to justify the finding that the plaintiffs were heirs at law of John Surls, and that neither John or Caswell Pollard nor Thomas Slaughter left any children. Whether the jury would have found the facts on these points in accord with the contentions of the plaintiff or not, there was sufficient evidence to submit the case to their finding. In directing a nonsuit there was

Error.

E. A. GOODMAN AND L. G. GOODMAN v. JOHN D. HEILIG, ADMINISTRATOR OF A. S. HEILIG AND B. H. HAMILTON.

(Filed 15 November, 1911.)

1. **North Carolina Railroad—Location—Judicial Notice—Rights of Way—Powers.**

   The courts will take judicial notice of the fact that the North Carolina Railroad is a great public highway, running from Goldsboro to Charlotte through Rowan County; that it belongs to a *quasi*-public corporation chartered in 1849 by an act of the General Assembly, having full power of eminent domain, with provision that where land is not condemned for a right of way within a certain time, the corporation acquires a right of way 100 feet on each side the center of the track.

2. **Railroads—Easement—Fee—Reverter.**

   A railroad corporation does not acquire the fee simple to the land covered by its right of way, but only an easement therein, which would revert to the owner of the fee relieved of the burden of the easement should the railroad be discontinued.

3. **Deeds and Conveyances—Warranty—Breach—Railroads—Easements—Notice—Pleadings—Demurrer.**

   A purchaser of lands upon which the right of way of the North Carolina Railroad partially lies is fixed with notice of the easement, and is presumed to have taken it into consideration in the terms of purchase; therefore, when an action is based solely upon a covenant of warranty in a deed which does not exclude therefrom an easement of the said railroad company in the lands conveyed, this easement will not be construed as a breach of the warranty, and a demurrer to the complaint solely on that ground will be sustained.

APPEAL from *Lyon, J.*, at May Term, 1911, of ROWAN.

Civil action to recover damages for breach of covenant against encumbrances contained in a deed from A. S. Heilig to W. J. and Julia Crowell, and on a deed from B. H. Hamilton, grantee of Crowell, to plaintiffs. The covenants are practically the same in both deeds. The encumbrance is charged in these words: "but such portion of said land was at the time of the execution of said deeds, and has been ever since, owned by the North Carolina Railroad Company as a right of way." The defendants' demurrer sets out six grounds. It is necessary to consider only one, viz.: "That plaintiffs' complaint does not state facts sufficient to constitute a cause of action, in that, as a question of law, the use and occupation of a portion of the lands described in the complaint, as a right of way, by the North Carolina Railroad Company under its charter pursuant to the acts of the Legislature of 1849, was constructive notice of said company's right of way, and does not constitute a breach of warranty or covenant on the part of defendants. That as a matter of law, the right of way alleged to be claimed by the North Carolina Railroad Company does not constitute any valid encumbrance upon the title of plaintiffs nor any breach of the covenants of warranty and seizin, as alleged by the plaintiffs."

The demurrer was sustained by his Honor, *Judge Lyon,* at May Term, 1911, of the Superior Court of Rowan County, and plaintiffs appealed.

J. L. Randleman, Jerome & Price for plaintiffs.

John S. Henderson, R. Lee Wright, and P. S. Carlton for defendants.

BROWN, J. We take judicial notice of the fact that the North Carolina Railroad is a great public highway, running from Goldsboro to Charlotte through Rowan County. It belongs to a *quasi*-public corporation chartered in 1849 by an act of the General Assembly that gives the corporation full power of eminent domain and provides that where land is not condemned for a right of way within a certain time, the corporation acquires 100 feet on each side of the center of the track. The road has been in actual operation since 1853. It was admitted upon the argument that the road is now being double tracked, and the injury set up in the complaint is the construction of a "fill" upon a small part of the right of way upon which the additional track is laid. Plaintiffs claim that the boundaries of the deed take in some part of the right of way.

We are of opinion with his Honor that the demurrer should be sustained.

The railroad corporation has not acquired the fee simple to the land covered by its right of way, but only an easement in it. If the railroad should be discontinued the land would revert to the owner of the fee relieved of the burden of the easement, and the owner would then have an absolute title without encumbrance.

While this easement may be in one sense an encumbrance or burden upon the fee, it is in this particular case such an encumbrance as a purchaser has knowledge of and is bound to take into consideration before purchasing. The railroad right of way is a great public highway of which all persons must take notice, and as said by *Kennedy, J.,* in *Patterson v. Arthurs,* 9 Watts Penn., 152: "It is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and consequently, if there be a public road or highway open or in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price he was willing to give for the land with reference to the road."

In *Hymes v. Estey,* 116 N. Y., 505, *Justice Bradley* says: "It must be deemed the settled doctrine in this State that the fact that part of the land conveyed with covenant of warranty was at the time of conveyance a highway, and used as such, is not a breach of the covenant. This is so for the reason that the grantee must be presumed to have known of the existence of the public easement, and purchased upon a consideration in reference to the situation in that respect."

To same effect are *Whitbeck v. Cook,* 15 Johns. N. Y., 483; *Huyck v. Andrews,* 113 N. Y., 85; *Wilson v. Cochran,* 46 Penn. St., 229; *Jordan v. Eve,* 72 Va., 1; *Pomeroy v. R. R. Co.,* 25 Wis., 644; *Pick v. Hydraulic Co.,* 27 Wis., 443; *Trice v. Kayton,* 84 Va., 219-220, citing and approving *Jordan v. Eve; Des Verges v. Willis,* 56 Ga., 515.

In *Kutz v. McCune,* 22 Wis., 628, the Supreme Court of Wisconsin says: "That such a right does not constitute a breach of the covenant of seizin, see Rawls on Covenants, 83, 142. It may have been an encumbrance. But there is a principle recognized by adjudged cases, and resting upon sound reason and policy, which holds that purchasers of property obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition, take it subject to such right without any express exceptions in the conveyance, and that the vendors are not liable on their covenants by reason of its existence. This principle has been applied in the case of a highway opened and in use upon the land at the time of the conveyance. Rawls on Covenants, 141 *et seq.*"

There are a few adjudications looking to the contrary, especially in Indiana, where the rule is different. But the great weight of authority, we think, concurs with our own precedents. The point was considered in *Ex parte Alexander,* 122 N. C., 727, and this Court held that "The fact that a railroad was in actual operation over a tract of land at the time of the sale of the land was sufficient notice to the purchaser of the occupant's equity or easement, and made it his duty to inquire for information."

While the point was not squarely presented or decided in the more recent case of *Tise v. Whitaker,* 144 N. C., 515, *Mr. Justice Hoke* recognizes the rule as we have here laid it down, and refers to it in these words: "The weight of authority is to the effect that, when the existence of a public right of way over land is fully known at the time of the purchase and acceptance of a deed for the land, its existence is no breach of the covenant of warranty, and there are well-considered decisions to the effect that such an easement is not a breach of the covenant against encumbrances. The parties are taken to have contracted with reference to the existence of a burden of which they are fully aware."

When the plaintiffs purchased the land they knew of the existence of the railroad and its right of way running over a portion of the land, and they are conclusively presumed to have purchased with reference to it.

The action cannot be maintained. The judgment sustaining the demurrer is

Affirmed.

GEORGE JEFFORDS ET AL. v. ALBEMARLE WATERWORKS.

(Filed 15 November, 1911.)

1. **Evidence—Witness, Nonexpert—Opinion Upon the Facts.**

In an action to recover under a contract for boring an artesian well, wherein it is alleged that the plaintiff was wrongfully prevented from completing the contract, and defended upon the ground that the plaintiff did not use the proper machinery, especially for straightening crooked places caused by a deflection of hard rock, it is competent for a witness for plaintiff to testify that the machine used was "the best and latest all-round equipped machine for drilling water wells," and that it had all proper and necessary tools for drilling and straightening crooks, etc., and that he could have bored to the required depth with them, it being "the testimony of a witness to a physical fact peculiarly within his knowledge" and not requiring expert evidence.

2. **Pleadings—Contracts—Evidence.**

In an action brought upon contract, evidence relating to a second contract which was not pleaded is incompetent.

3. **Evidence—Depositions—Nonresidents—Parties—Commencement of Action.**

The depositions of a party, objected to because the deponent was in the State when the action was begun, are competent when it appears that he was a resident of another State and not within this State at the time of the trial. Revisal, 1645 (9).

4. **Contracts—Written—Fraud—Parol Evidence—Conversations.**

Without allegation of fraud or misrepresentation, conversations preceding the execution of a written contract are incompetent to vary, alter, or contradict its terms.

5. **Evidence—Contracts—Use of Improper Machinery—Former Use.**

When the defense in an action to recover upon a contract to bore an artesian well, alleging that the defendant wrongfully stopped the plaintiff from boring it, is that the plaintiff was not using proper machinery and equipment, evidence as to the insufficiency of a machine formerly used is incompetent.

6. **Evidence—Depositions—Motion to Quash—Objections and Exceptions—Practice.**

A deposition can be quashed only for irregularities in the taking or the incompetency of the witness, and exception should be taken to the questions and answers of the deponent and not by motion to quash the depositions.

7. **Evidence—Depositions—Commission—Name of Witness—Practice.**
It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exception is taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. Revisal, 1652.

8. **Appeal and Error—Reference—Findings—Evidence.**
The facts found by the referee and confirmed by the trial judge are not reviewable on appeal when there is evidence to support them; and exceptions to such findings, that they are "contrary to the weight of the evidence," cannot be sustained.

APPEAL by defendant from *Lyon, J.*, at March Term, 1910, of STANLY.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Jerome & Price and R. L. Smith for plaintiff.
J. R. Price and T. F. Kluttz for defendant.

CLARK, C. J. This is an action to recover the contract price for boring an artesian well. The plaintiffs alleged that they were wrongfully prevented by the defendants from completing the contract; but the defendants denied this, and alleged that the failure of the plaintiffs to complete the contract was caused by their failure or refusal to use the necessary machinery for straightening crooked places in the well, caused by the drill being deflected by hard rock.

The case was referred to a referee, who adjudged the plaintiffs entitled to recover the contract price for the work actually done up to the time they were stopped by the defendants. The exceptions before us are to the judge's overruling the exceptions by the defendants to the referee's report. Exceptions 1, 2, and 3 are to the witness stating in reply to questions asked that the machine was "the best and latest all-round equipped machine for drilling water wells; that it was equipped with all necessary tools for drilling and straightening crooks in water wells, and that he could have gone to any desired depth within 800 feet with that machine." The objection is on the ground that the witness had not qualified as an expert. But we do not think that "the testimony of a witness concerning a physical fact peculiarly within his knowledge" is expert evidence. *Britt v. R. R.,* 148 N. C., 40, and cases there cited.

The evidence as to the second contract was properly ruled out, as there was no plea of a second contract.

The objection to the deposition of George Jeffords, because he was a party to the action and was in this State when the action was begun, cannot be sustained, for the referee finds as a fact that the witness was a resident of Pennsylvania when the deposition was taken. Revisal, 1645(2). The deposition is competent if the witness is out of the State at the time of the trial and is more than 75 miles from the place where the court is sitting. Revisal, 1645 (9); *Barnhardt v. Smith,* 86 N. C., 473.

The contract being in writing and no allegation of fraud or misrepresentation, it was not error to exclude conversations preceding the execution of the contract. *Bowser v. Tarry,* 156 N. C., 35.

The question as to the insufficiency of a prior machine and its equipment was irrelevant and could throw no light upon the inquiry before the court. It was properly excluded.

Exceptions 8 and 9, for refusal of motion to quash because of the irrelevancy or incompetency of some of the testimony, cannot be sustained. A deposition can be quashed only for irregularities in the taking or for the incompetency of the witness, and not upon the ground that some of the answers were incompetent or irrelevant. Such questions and answers should be excepted to.

Exception 10 is that the name of the witness was not given in the commission to take the deposition. But the notice to take the deposition gave the name of the witness and the address of the commissioner before whom it was to be taken. The defendant knew that this witness was to be examined, the cause in which, the place where, and the commissioner before whom he was to be examined. The statute does not require the name of the witness to be stated in the commission. The names of other witnesses were, however, given in the commission. It does not appear that the defendant was prejudiced, for the notice to take deposition did name this witness. In *McDugald v. Smith,* 33 N. C., 576, the notice was to take the deposition "of A., B., C. *et al.,*" and no deposition of A., B. or C. was taken, and it was held that this was not ground for exception to the depositions of the other witnesses which were taken.

The refusal of the judge to recommit the report to the referee was a matter which rested in his discretion. The exceptions to the finding of fact by the referee are that they are "contrary to the weight of the evidence." That was a matter addressed solely to the trial judge, and cannot be considered here. *Lewis v. Covington,* 130 N. C., 541. When, as here, the referee's findings of fact are affirmed by the judge, his action is conclusive if there is any evidence to support such findings. *Brown v. R. R.,* 154 N. C., 300; *Mirror Co. v. Casualty Co.,* 153 N. C., 373. On examination, we find that there was evidence as to each finding of fact, and such findings are not open to review on appeal. *Williams v. Hyman,* 153 N. C., 167.

Affirmed.

LELIA A. PATTERSON, BY HER NEXT FRIEND, v. THE GREENSBORO LOAN AND TRUST COMPANY.

(Filed 15 November, 1911.)

1. Gift—Delivery—Intent, Expressed or Implied.

To sustain a valid gift of personal property there must be an actual or constructive delivery with the present intent to pass title.

2. Same—Evidence—Donee's Trunk.

In an action involving the question of a gift to a granddaughter of personalty by the grandfather, there was evidence tending to show that the grandmother had given her a trunk, always spoken of as hers and which remained at the home of the grandparents; that while the donee and her mother were visiting there, soon after her birth, the grandmother showed the grandfather a $5 gold-piece which had been given to the donee by another, whereupon the grandfather said: "Well, we will keep that up. I will keep it up. I expect to give her $5 in gold every 22d of the month for her birthday"; that he did so on several such occasions; that in the last illness of the grandfather he told donee's mother to move the trunk. "I want you to move it; you may move this trunk now, if you want to, or you can wait and move it after I am dead," the trunk being there present; that the grandmother died about eighteen years ago and the grandfather in 1907; that the trunk was removed after the grandfather's death, and when opened contained $1,050 in gold, only a few small clothes formerly worn by the donee, and nothing of real value of the donor's: *Held*, sufficient evidence of a gift of the $1,050 in gold. *Brewer v. Harvy*, 72 N. C., 176, cited and distinguished; *Newman v. Bost*, 122 N. C., 524, cited and applied.

APPEAL from *Daniels, J.*, at April Term, 1911, of GUILFORD.

Civil action to recover $1,050 in gold, alleged to have been given to plaintiff by her grandfather, the intestate.

The jury rendered the following verdict: "Did the intestate of the defendant give Lelia A. Patterson, during his lifetime, the $1,050, as alleged in the complaint? Answer: Yes."

Judgment on the verdict, and the defendants excepted and appealed.

John A. Barringer and Thomas M. Calvert for plaintiff.
G. S. Bradshaw and King & Kimball for defendant.

HOKE, J. The authorities in this State are in full support of the position contended for by defendant, that in order to a valid gift of personal property there must be an actual or constructive delivery with the present intent to pass the title. *Gross v. Smith*, 132 N. C., 604; *Duckworth v. Orr*, 126 N. C., 674; *Wilson v. Featherston*, 122 N. C., 747; *Newman v. Bost*, 122 N. C., 524; *Medlock v. Powell*, 96 N. C., 499; *Adams v. Hayes*, 24 N. C., 361.

The Court is of opinion, however, that without any impairment of the principle recognized and sustained in these cases, there are facts in evidence from which delivery could be properly inferred by the jury. From the testimony of the principal witness it appeared that Lelia A. Patterson is the daughter of Roxie Patterson and the granddaughter of William Collins; that William Collins died on 6 April, 1907, and that the wife of William Collins, grandmother of Lelia, died about eighteen years ago; that the grandmother of Lelia had given Roxie Patterson a trunk for Lelia, and that the trunk was always called and used as Lelia's, and remained in an upstairs room in the Collins home until after the death of the grandmother; that in the summer after the birth of Lelia, while Roxie Patterson and child were on a visit to the grandparents, the mother showed the grandfather a $5 gold-piece which she said Judge Armfield had given to her for the child, whereupon the grandfather remarked, "Well, we will keep that up. I will keep that up. I expect to give her $5 in gold every 22d of the month for her birthday." He then and there began the practice of putting into the child's trunk $5 in gold every month, and after the death of the grandmother the trunk was brought down into his room. On several visits of the mother she saw the grandfather put $5 in gold into it when the monthly birthday of Lelia happened at the time. Some of Lelia's things were in the trunk, that is to say, shoes, little hose, dresses, and things of that kind." Lelia's pet name was Hon, and in the grandfather's last illness he said to his daughter: "There's Hon's trunk; I want you to move it; you may move this trunk now, if you want to, or you can wait and move it after I am dead." The trunk was not then removed, and after his death it was opened and the sum of $1,050 in gold was found therein. There is no evidence that the trunk contained anything of value belonging to the deceased, that is, there was no other money in gold, nor were there any valuable papers.

True, there is a case in our reports, *Brewer v. Harvy,* 72 N. C., 176, where a father standing on his piazza with his wife and child, a girl 12 years of age, pointed to a colt some distance off and said to the child, "That is yours; I give it to you," and in another case a colt on the father's farm was always recognized by and spoken of as his son's colt and the father had told the son he might have the colt if he would raise it. In both, the Court held there was not a valid gift for lack of proper delivery; but in both, it will be noted, there was no possession or control of the property given to the alleged donee or to any one for him. In our case the money was from time to time put by the intestate in the trunk recognized as the child's trunk, and in the last illness of the donor he said to the child's mother, the trunk being present: "There's Hon's trunk; I want you to move it; you may move it now, if you want to, or you can wait and move it after I am dead." On this testimony we think his Honor correctly ruled that the question of delivery was for the jury. The case comes rather within the principle applied in *Newman v. Bost, supra,* in which it was held: "Where the articles are present and are capable of actual manual delivery, such delivery must be made in order to constitute a gift *inter vivos* or *causa mortis;* but where the intention of the donor to make the gift plainly appears and the articles intended to be given are not present, or, if present, are incapable of manual delivery, effect will be given to a constructive delivery."

There is no error, and the judgment for plaintiff must be affirmed.

No error.

C. H. CURRY v. F. H. FLEER.

(Filed 15 November, 1911.)

1. **Public Highways—Motor Vehicles—Operation—Declaratory Statutes—Interpretation.**

   The Laws of 1909, ch. 445, requiring a person operating a motor vehicle "to slow down to a speed not exceeding eight miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of" a horse being ridden or driven, etc., upon the highway upon which the motor is being driven, etc., with the exception of establishing a speed limit, is to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. *Gaskins v. Hancock,* 156 N. C., 56; *Tudor v. Bowen,* 152 N. C., 441, cited and applied.

2. **Same—Requirements.**

   The maximum speed limit of eight miles an hour for the running of motor vehicles upon the highways in approaching horses being ridden or driven thereon, etc., prescribed by the Laws of 1909, ch. 445, does not contemplate or intend that the specified limit is always permissible; for one driving a machine of this character is charged with notice of things which he observes or could observe in the exercise of proper care, having regard to the nature of the vehicle he is operating and its tendency to frighten animals; and not infrequently it may become his duty to move at a much slower speed, or stop altogether if conditions so require.

3. Same—Negligence—Evidence—Nonsuit.

In an action for damages for personal injury received by reason of the team plaintiff was driving becoming frightened from a motor vehicle approaching from the rear, there was evidence tending to show that the speed of the automobile greatly exceeded the limit prescribed by the Laws of 1909, ch. 445, and that the machine was upon the plaintiff's team without adequate warning and without giving him "any chance to hold on to his horses": *Held*, sufficient to go to the jury upon the question of defendant's actionable negligence, not so much and of itself that the speed limit was exceeded, but tending to show the defendant's negligence in not doing what the circumstances reasonably required for the plaintiff's safety; and upon conflicting evidence, a motion to nonsuit should be denied.

4. Evidence—Objections and Exceptions—Appeal and Error—Harmless Error.

Over defendant's objection, plaintiff was permitted to ask the witness of the former if he had not sold his land to the defendant at a big price: *Held*, if on the facts the answer had a reasonable and natural tendency to create a bias in defendant's favor it was relevant; and if otherwise, it would be harmless and not reversible error.

APPEAL from *Lyon, J.*, at April Term, 1911, of DAVIDSON.

Civil action to recover damages for injuries caused by alleged negligence of defendant in driving his automobile.

There was evidence on part of plaintiff tending to show that on 7 December, 1909, on the road about one and a half miles from Thomasville, plaintiff was driving a two-horse wagon, loaded with 100 chairs, when his horses took fright at defendant's automobile, and, getting beyond his control, ran the wagon against a telephone post, whereby plaintiff was thrown to the ground and received painful physical injuries; that the automobile, driven by defendant, approached from behind at a speed of fifteen or twenty miles an hour; sounded the warning signal when only 25 yards back, and came so suddenly on witness that he had no chance to get control of his team and prevent the running. Speaking to this question, the witness said: "Just passed right by me all at once and didn't give me any chance to hold on to the horses, trying to do all I could with them. If I had had warning in time, I might have prevented the horses from running away."

The evidence of defendant tended to show that he approached at a speed of twelve miles, reduced to eight when nearing the team; gave the ordinary and usual signals 100 feet back, and passed without observing any sign of fright in the horses or of any change or disturbance in the movement of the team, etc. There was further evidence on part of defendant tending to show that the horses were young horses, unused to the road, and that there was no default on part of defendant in the use and operation of the machine or in failing to give the proper signal.

The question of defendant's negligence was submitted to the jury, and the following verdict rendered:

"Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"What damages, if any, is plaintiff entitled to recover? Answer: $500."

Judgment on the verdict, and defendant excepted, alleging for error, chiefly, the refusal of the court to order a nonsuit.

Phillips & Bower and McCrary & McCrary for plaintiff.
E. E. Raper and A. F. Sams for defendant.

HOKE, J., after stating the case: The General Assembly of 1909 made extended regulation in reference to the ownership, operation, and use of the automobile. Laws 1909, ch. 445, Pell's Supplement, secs. 3876, a to t, inclusive, and on matters more directly relevant, the statute provides as follows: "Upon approaching a horse or horses or other draft animals, being ridden, led, or driven thereon, a person operating a motor vehicle shall slow down to a speed not exceeding eight miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person or animal, and in case of a horse or horses or other draft animals, to prevent frightening the same." With the exception of establishing speed limits, this legislation is to a great extent an embodiment of the general principles of law applicable to these motor vehicles when operated on the highway and on places where their use is likely to be a source of danger to others; principles recognized and applied in two recent cases before the Court: *Gaskins v. Hancock,* 156 N. C., 56; *Tudor v. Bowen,* 152 N. C., 441.

Speaking to the duties incumbent upon chauffeurs and others driving these cars, in *Tudor's case, supra, Associate Justice Brown* said: "Although the use of automobiles began in recent years, it seems to have caused much litigation, though not in this State. It is the consensus of judicial opinion that it is the duty of the operator of an automobile upon highways and public streets to use every reasonable precaution to avoid causing injury, and this duty requires him to take into consideration 'the character of his machine and its tendency to frighten horses.' *Hannigan v. Wright,* 63 Atl. Rep., 234; *House v. Cramer,* 13 Am. and Eng. Annotated Cases, p. 463, note, and cases cited. The possession of a powerful or dangerous vehicle imposes upon the chauffeur the duty of employing a degree of care commensurate with the risk of danger to others engendered by the use of such a machine on a public thoroughfare." And it may be well to note that the legislation referred to establishes, as a rule, a maximum rate of speed "not exceeding eight miles an hour," etc., and in doing so it is not at all contemplated or intended that the specified limit is always permissible. The chauffeur or other driving a machine of this character on the public highway is charged with notice of things which he observes or could observe in the exercise of proper care, having regard to the nature of the vehicle he is operating and its tendency to frighten animals, and not infrequently it may become his duty to move at a much slower speed, and stop altogether if conditions so require. This, too, is in accord with approved precedent (*Christy v. Elliott,* 216 Ill., p. 31), and is expressly recognized in other sections of the statute, notably Pell's Supplement, 3876m, 3876n, 3876p, and 3876r, 3876s, the last citation being in terms as follows: "Nothing in the general law shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator, or his agent, employee, or servant, of any motor vehicle, or resulting from the negligent use of the highway by them or any of them."

Applying the principle, the case was clearly one for the jury. The grievance alleged on part of plaintiff, being not so much and of itself that the speed limit was exceeded—a limit established principally to lessen the danger of collision—but because, by reason in part of exceeding the speed limit, the machine was upon the plaintiff's team without adequate warning; that at twenty miles per hour and a signal at 25 steps behind, to use the plaintiff's own language, the vehicle "just passed right by me all at once and didn't give me any chance to hold on to my horses, trying to do all I could." True, there is evidence on defendant's part in contradiction of this testimony, but, under a correct charge, the jury have accepted the plaintiff's version, and, in our opinion, an actionable wrong is clearly established.

Objection was further made that the court allowed plaintiff to ask a witness who testified for defendant if he had not sold his land to defendant at a big price. The answer was admitted as tending to show a bias in defendant's favor. If on the facts the answer had a reasonable and natural tendency to create a bias in defendant's favor, it was relevant, and if otherwise it should be treated as harmless, and certainly not held for reversible error. We find no error in the record, and the judgment in plaintiff's favor must be affirmed.

No error.

J. W. CARMICHAEL v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 15 November, 1911.)

1. **Damages, Compensatory—Punitive Damages.**

When compensatory damages are allowable they should not be confined to an actual pecuniary loss, upon the theory that any recovery above actual loss in money or time having a definite pecuniary value partakes of the nature of punitive damages.

2. **Damages, Compensatory—Measure of Damages.**

On an issue as to actual or compensatory damages caused by an injury inflicted, the plaintiff may recover, in proper instances, whatever the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done.

3. **Same—Standards of Measurement—Contracts.**

While a recovery for damages for a breach of contract is ordinarily confined to such as are in reasonable contemplation of the parties at the time of making it, which are susceptible of ascertainment with a reasonable degree of certainty, and limited to pecuniary recompense for the loss sustained by the injured party, the position having its origin and basis in the fact that the vast majority of contracts concern themselves with pecuniary values and have the pecuniary standard for adjustment alone in contemplation, the doctrine does not extend to an agreement which clearly has reference to a different standard, for in such cases damages in case of breach must be awarded according to the standard which the parties have adopted.

4. **Corporations—Public Service—Breach of Contract—Torts—Measure of Damages.**

A telephone company, a public-service corporation operating under a public franchise, is responsible for its breach of duty in rendering the service it has undertaken to perform for one having contractual relationship with it, and when suffering special injury by reason of such breach, he is entitled to sue in tort, and, in case of recovery, to have his damages admeasured as in that character of action.

5. **Same—Telephone Companies—Payment of Rentals.**

The plaintiff having protested to defendant that he had paid for the rental of his telephone service at his home, claiming he had a receipt therefor which he had temporarily mislaid, but promised to produce, found upon returning home Saturday night that the telephone connection had been severed there in his absence and so continued until the following Monday morning, when he paid under protest and had his telephone service restored. There was conflicting evidence as to whether the plaintiff had actually paid the rental, the company protesting that the receipt was given by mistake as to the amount: *Held*, the plaintiff, when his cause of action has been established, may recover upon the tort arising from defendant's breach of contract.

6. **Same—Mental Anguish—Duty to Avoid or Minimize.**

The plaintiff, in this case, having a right to sue a telephone company, a public-service corporation, in tort for wrongfully disconnecting his telephone service, evidence on the question of damages was competent which tended to show his suffering and anxiety naturally arising from the fact that his father-in-law was at the time in a hospital, supposed to be in a dangerous condition, which was known to the company, or its managing officers, and occasioned by the loss of the telephone service at such time, but not the suffering and anxiety caused by the placing and condition of the father-in-law; and in awarding any damages imputable to this source, it should be considered whether he did what he reasonably could have done to lessen his anxiety.

7. **Corporations—Telephones—Public Service—Tort—Willful and Wanton—Punitive Damages.**

In awarding damages to one whose telephone service has wrongfully been disconnected by a public-service telephone corporation, the jury may award such punitive damages in addition to compensatory damages as they may deem right and proper, when, in proper instances, they find the act was done maliciously or under such circumstances of willfulness on the part of the defendant as to show a wanton or reckless disregard of plaintiff's rights.

8. **Same—Compensatory Damages—Evidence—Questions for Jury.**

Upon the question of allowing exemplary as well as actual damages in this case, as presented, for the disconnection of the plaintiff's service by the defendant telephone company, the jury should consider as circumstances relevant to the inquiry evidence tending to show that the plaintiff informed the defendant of the payment he had made, that he had a receipt therefor, that the defendant still insisted there was no such payment, and further, that the plaintiff had several times made default in payment of his dues, and that the defendant had been informed by its proper agents that plaintiff owed the balance concerning which the service had been disconnected.

APPEAL from *Peebles, J.,* at April Term, 1911, of NEW HANOVER.

Civil action to recover damages for wrongfully removing a telephone from plaintiff's premises. There was evidence tending to show that the telephone charges due from plaintiff were at the rate of $4.50 per quarter, payable in advance, beginning 1 January; that plaintiff on 3 June, 1908, paid defendant the $4.50 for the quarter beginning 1 April, and took a receipt for same; that in the latter part of June plaintiff was notified there was a balance against him of $3 for said quarter, and unless same was paid the telephone would be removed. Plaintiff protested and informed the agents of defendant company that he had paid the dues and could produce a receipt. Plaintiff failed to find the receipt readily, as he had given it to his wife, who was temporarily from home in daily attendance on her father, who had been operated on and was in the hospital; and thereupon, in afternoon of 27 June, 1908, defendant company, while plaintiff was absent, disconnected the phone and deprived plaintiff and his family of its use from Saturday night until Monday morning, 29 June; that on Monday morning, 29 June, plaintiff went to the offices of the company, paid the $3 claimed, under protest, and the service was thereupon restored; that in July following, the plaintiff found the receipt for the $4.50, the entire price for the quarter, and on failure to adjust matters, action was instituted.

On the question of damages, plaintiff testified among other things that the telephone was used for the purpose of calling up physicians, hospitals, druggists, doing the marketing, grocery business, and other general household uses, and proposed further to show that at this particular time plaintiff suffered special inconvenience and annoyance by reason of the fact that his father-in-law had been operated on and was then at the hospital in a dangerous condition, and plaintiff was unable to communicate with the hospital concerning him or with his family, which was then at the beach some distance away.

There was evidence from which knowledge of these special conditions on the part of the company might be inferred. The proposed evidence was excluded, and plaintiff excepted.

There was testimony on part of defendant to the effect that plaintiff was not prompt in payment of his telephone dues, and that on two or three occasions before this it had been necessary to disconnect his telephone for nonpayment of dues; that while plaintiff produced a receipt for the $4.50, the dues for the quarter ending 30 June, 1908, as a matter of fact he had only paid $1.50, and it was so reported to the company by the collecting agent; that the receipt for $4.50 was signed by mistake to a printed form in which the amount was so stated, the agent failing to change this to $1.50, the amount actually paid, and that the books of the company showed the amount due to be $3, and that in fact such amount was due for said quarter; that defendant had no malicious or improper motive in disconnecting the telephone or in collecting the $3, but acted in the honest belief it was enforcing its rights in the premises.

His Honor ruled that plaintiff could not in any event recover damages in excess of $3, the amount of overcharge as claimed by plaintiff, and under such ruling the following verdict was rendered:

"1. Did the defendant unlawfully cut out plaintiff's telephone, as alleged in the complaint? Answer: Yes.

"2. If so, what damage is plaintiff entitled to recover therefor? Answer: Three dollars, and interest to date from 29 June, 1908."

Judgment on the verdict for $3, with interest, and plaintiff excepted and appealed, assigning errors.

Rountree & Carr for plaintiff.
H. E. Palmer, B. J. Clay, and J. D. Bellamy for defendant.

HOKE, J., after stating the case: An impression not infrequently exists, and is sometimes acted on, that in the larger number of ordinary causes compensatory damages should be confined to actual pecuniary loss, and that any recovery above actual loss in money or time having definite pecuniary value partakes of the nature of punitive damages. Speaking to this question in a concurring opinion in *Ammons v. R. R.*, 140 N. C., 199, it was said: "The court below and the parties litigant seem to have considered that the seventh issue on actual damages was confined to pecuniary loss, and that any recovery over and above this must be had, if at all, on the eighth issue, above set out. But this is not at all true. 'Actual,' in the sense of compensatory damages, is not restricted necessarily to the actual loss in time or money. The claimant may be confined to this, if the jury so determine, but more than this is contained in the term, and more than this is covered by the issue." As said by *Clark, C. J.*, in *Osborn v. Leach*, 135 N. C., 628: "Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering," etc. And again: "Compensatory damages include all other damages than punitive, thus embracing not only special damage as direct pecuniary loss, but injury to feelings, mental anguish," etc., citing 18 Am. and Eng. Enc. (2 Ed.), 1082; Hale on Damages, pp. 99, 106. And this last author says: "It may be stated as a general rule, in actions of tort, that whenever a wrong is committed which will support an action to recover some damages, compensation for mental suffering may also be recovered if such suffering follows as a natural and proximate result." And so here, where a passenger is wrongfully ejected from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, physical inconvenience, and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. *McNeill v. R. R.*, 135 N. C., 683; *Head v. R. R.*, 79 Ga., 358; Hale on Damages, *supra*, sec. 261. As said by *Bleckley, J.*, in *Head's case:* "Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law compensatory damages include, upon principle and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."

And on the subject of punitive damages it was further said: "Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded, in addition to compensation, as a punishment to defendant and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights."

In the view of compensatory damages, suggested with approval in this citation, there was error in the ruling which limited plaintiff's recovery in any aspect of the case to the $3, the amount of money wrongfully collected by defendant, whether the action should be considered as one for a breach of contract or for a tort. It is true that recovery for breach of contract is confined to such damages as were in the reasonable contemplation of the parties at the time same was made and which are susceptible of ascertainment with a reasonable degree of certainty, and that ordinarily this damage is limited to pecuniary recompense for the loss sustained by the injured party; but this will be found to have its origin and basis in the fact that the vast majority of contracts concern themselves with pecuniary values and have the pecuniary standard for adjustment alone in contemplation; but where an agreement clearly has reference to a different standard, damages in case of breach must be awarded according to the standard which the parties have adopted. This is the principle upon which recoveries for mental anguish in a certain class of telegraph cases, and when treated simply as actions for breach of contract, are properly made to rest, as shown in the well-considered opinion by our present *Chief Justice* in *Young v. Telegraph Co.,* 107 N. C., 370, a decision since followed and applied by the Court in numerous cases; and so in contracts for telephone service for household purposes pecuniary values are not ordinarily in contemplation, and on breach, even when the action is simply for breach of contract, a different standard of adjustment must necessarily or may properly be adopted, to wit, a fair compensation for the loss and for the inconvenience and annoyance in being wrongfully deprived of the service stipulated for. *Telephone Co. v. Hobard,* Miss., 42 So. Rep., 349; Hale on Damages, p. 102.

On the allegations of the complaint, however, and the facts in evidence, the plaintiff is not confined to a recovery for breach of contract. It appears that defendant is a public-service corporation operating under a public franchise, and for breach of duty in rendering the service it has undertaken to perform, one having contract relations with such company and suffering special injury by reason of such breach is entitled to sue in tort, and, in case of recovery, have his damages admeasured as in that character of action. This was held in *Peanut Co. v. R. R.,* 155 N. C., 148, citing several other decisions to like effect, and see, in that case more especially, the concurring opinion of *Associate Justice Allen,* as to the obligation of diligence imposed by the law upon corporations of this kind and the character of action available in case of breach causing special damages to persons having contract relations with such companies.

Plaintiff, then, having a right to sue in tort if his cause of action is established, is entitled to recover a compensation for the annoyance and inconvenience and humiliation fairly attributable to the wrong done and under facts as they existed at the time the same was committed. *Peanut Co. v. R. R., supra.*

And in this view the annoyance and inconvenience naturally arising from the fact that plaintiff's father-in-law was at the time in the hospital and supposed to be in a dangerous condition, if this circumstance was known to the company or its managing officers—not, of course, the suffering and anxiety caused by the father-in-law's placing and condition, but the annoyance and anxiety occasioned by the loss of the telephone service at such time. In considering any damages imputable to this source, the obligation on plaintiff to do what he reasonably could to lessen his anxiety is also a proper subject for consideration. *Bowen v. King,* 146 N. C., 385; *R. R. v. Hardware Co.,* 143 N. C., 54.

On the question of punitive or exemplary damages, recurring again to the doctrine as stated in the *Ammons case, supra,* if the jury should find that the wrong complained of was committed and that the same was done maliciously or under such circumstance of willfulness on part of defendant as to show a wanton or reckless disregard of plaintiff's rights, they may, in addition to compensatory damages, award such additional damages by way of punishment as they may deem right and proper. In this aspect of the matter the principles and authorities applicable are more fully discussed and referred to in the case of *Williams v. R. R.,* 144 N. C., 502.

On this question of allowing exemplary damages, as well as the amount, in case the jury should determine to award the same, the fact that plaintiff informed defendant of the payment of the amount due and that he had a receipt showing this, and that defendant still insisted there was no such payment, and, further, the fact that plaintiff had several times before made default in payment of his dues, and that this collecting agent had informed the managing officers of the company there was a balance still due, and that the books of the company showed this to be correct, are circumstances relevant to the inquiry.

For the error indicated plaintiff is entitled to a new trial of this cause, and it is so ordered.

New trial.

STANDARD MIRROR COMPANY v. PHILADELPHIA CASUALTY COMPANY.

(Filed 9 November, 1911.)

1. **Appeal and Error—Failure to Docket—Motion to Dismiss—Practice.**

   A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of Court to which the appeal is returnable, and before the case is docketed. Supreme Court Rule 17.

2. Same.

When the appellant dockets his case on appeal in the Supreme Court at any time after the end of the term to which it is returnable, it will be dismissed, on motion.

3. Same—Motion to Reinstate.

An appellant is required by Rule 17 of the Supreme Court to move for a reinstatement of his case, after its dismissal upon motion of appellee, during the same term of the Court.

4. Appeal and Error — Appeal Abandoned — Motion to Dismiss — Practice.

When it appeared from the record on file in the Supreme Court, that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed.

5. Appeal and Error—Service of Case—Extension of Time—Agreement in Writing—Practice.

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Supreme Court Rule 39.

6. Appeal and Error—Service of Case—Extension of Time—Attorney and Client—Directions.

An attorney for appellee has no authority to extend the time for the appellant's attorney to serve his case on appeal when he has been forbidden by his client to do so.

7. Appeal and Error—Service of Case—Returns of Officer—Affidavit—Corrections.

In this case it was proven by the affidavit of the officer that though by his return upon the original statement of case on appeal by appellant it appears that the case was served on a certain date and in time, it was not in fact served until after the expiration of the time allowed or extended by agreement, and appellee's motion to dismiss is allowed. Officers serving papers are cautioned to make accurate returns, as, in law, they import verity and are *prima facie* evidence of their correctness.

APPEAL from *Daniels, J.*, at August Term, 1911, of GUILFORD.

Wescott Roberson and King & Kimball for plaintiff.
Stern & Stern and Walser & Walser for defendant.

PLAINTIFF'S APPEAL.

WALKER, J. The above-entitled action was tried at February Term, 1911, of Guilford Superior Court, and both parties appealed from the judgment therein. The plaintiff failed to docket its appeal at this term of Court, as it was required to do, and the defendant moved to dismiss the appeal under Rule 17. The motion of the defendant would be granted but for the fact that plaintiff had abandoned the appeal below. Rule 17 (140 N. C., 493) provides that such a motion shall be made during the term of this Court to which the appeal is returnable, and not after said term; so that the defendant moved in apt time. Even the appellant is required by the rule to move for a reinstatement of his appeal at that term. Not only is that the requirement of the rule, but it has been so construed to be its meaning in several of our decisions. *Benedict v. Jones*, 131 N. C., 473; *Graham v. Edwards*, 114 N. C., 228. The practice in such cases as arise under this rule of the Court is fully stated by the present *Chief Justice* in *Porter v. R. R.*, 106 N. C., 478, which was followed by *Hinton v. Pritchard*, 108 N. C., 412; *Paine v. Cureton*, 114 N. C., 606; *Causey v. Snow*, 116 N. C., 498, and numerous other cases cited in the note to *Porter v. R. R.*, at marg. p. 480 of the anno. edition of 106 N. C. The change in the time prescribed by the Rules for docketing transcripts in this Court has not had the effect of altering the requirement in regard to motions of appellees to dismiss under Rule 17, as was decided in *Benedict v. Jones*, *supra*. If the appellant should docket the case before a motion is made by the appellee to dismiss, it will defeat such a motion, but the latter may move in the matter during the return term of the appeal at any time after the case should be docketed here. If the appellant should docket his appeal at any time after the end of said term of this Court, it will also be dismissed on motion. *Benedict v. Jones, supra; Causey v. Snow, supra; Burrell v. Hughes*, 120 N. C., 277; *S. v. James*, 108 N. C., 792. It follows that, while the appellee in the plaintiff's appeal has come into this Court in time to avail itself of the right given by Rule 17 to dismiss, the motion is, nevertheless, denied, the plaintiff having abandoned its appeal, as appears from the papers on file here, and no motion to dismiss being really necessary.

Motion denied.

DEFENDANT'S APPEAL.

WALKER, J. This is a motion to dismiss the appeal or to affirm the judgment below in favor of the plaintiff, because the defendant did not prepare and serve its case on appeal in time. It appears that, by consent of the appellee, the plaintiff, it was allowed thirty days after the adjournment of the court on 26 February, 1911, to serve the case on appeal, but it was not served within the extended period. An unfortunate dispute between counsel as to an alleged further extension of time, by agreement between defendant's and one of appellee's (plaintiff's) counsel, has brought into this Court a disagreeable controversy, which, we have said more than once before, we would not undertake to decide. It would impose upon us an exceedingly unpleasant and delicate duty to perform if we should consent to hear and pass upon such disputes, and, therefore, this Court not only decided that it would not consider such controverted questions between counsel, but we have actually adopted Rule 39, which is as follows: "The Court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or a writing filed in the cause in this Court." This should have sufficiently warned members of the bar that if they consent to waive the directions of the statute, or of the Rules regarding the service of cases or the extension of time, the agreement must be evidenced by a writing; otherwise, if disputed, the party seeking to take benefit under it will not be heard by us. It is always better to reduce such agreements to writing, in order to prevent these unpleasant controversies, and this case but strikingly illustrates the wisdom and practical utility of the rule. The subject is fully reviewed by the present *Chief Justice* in *Graham v. Edwards,* 114 N. C., 229, and we reproduce here what was so aptly said by him in that case: "The alleged agreement (for an extension of time to docket case in this Court) was not in writing and is denied by appellee's counsel. It cannot, therefore, be considered. Rule 39 of this Court, and numerous cases cited in Clark's Code (2 Ed.), 704. This Court is for the correction of errors of law committed in the trial of causes below. We cannot be called upon to settle disputed matters of fact arising upon oral agreements of counsel. *Hemphill v. Morrison,* 112 N. C., 756. The duty of passing upon the correctness of memory of counsel as to such agreements when there is a difference, is a delicate one. It is not contemplated by the statute that we should be called upon to discharge such function, and we have no right or disposition to assume it. We again repeat, as was lately said in *Sondley v. Asheville,* 112 N. C., 694: 'It is to be hoped that hereafter counsel will in every instance put their agreements in writing or have them entered of record, when for any reason they may think best to depart from the plain provisions of the statute. If they do not care to do this, the courts will not pass upon the controversies as to the terms or existence of such agreements.' Our brethren of the bar owe it to themselves and to the Court to avoid bringing such controversies hereafter before the courts. Their experience as lawyers must impress upon them the treachery of memory among the very best of men. If not disposed to guard against differences of recollection by the easy mode of reducing agreements to writing, or having them entered on the minutes, the courts have no process to guage the accuracy of their respective recollections."

In this case there is not the least ground for the disparagement of counsel, as nothing has been done which is not entirely consistent with the strictest integrity and a proper professional courtesy. Counsel simply have disagreed in their understanding of the facts, and that is all, and to avoid such unpleasant occurrences, the rule was adopted, and must be observed, as stated by the *Chief Justice* in the case just cited. We are unable to say that either of the counsel is infallible, and, therefore, that the statement of the one should give way to that of the other. They are equally honorable and truthful, and there is nothing to show that the memory of either one of them is more retentive than that of the other. We are all liable to err and should deal with each other charitably on that account, as it is a frailty of human nature, and forgetfulness, therefore, is consistent with perfect honesty. The plaintiff's counsel was under the express and positive instructions of his client not to make any agreement for an extension of time in serving the case on appeal, at least after the allotted time had expired, and, therefore, did not have the authority to do so. It appears to us that he was very careful not to waive any of his client's rights or to disobey his instructions in what he did. We fully and readily acquit him of even the slightest wrongdoing, and find as a fact, and hold as matter of law, that he was at all times in the clear exercise of his legal rights as an attorney, and strictly observed the directions of his client, under which he was acting. He was without doubt misunderstood by the defendant's counsel and in his eagerness to be liberal and not disregard his client's instructions, he may have conceded too much, when the sheriff signed the return of service, but he did not surrender any of his client's rights and could not do so under the circumstances. This is an honest difference of recollection between counsel, but we cannot settle it otherwise than by enforcing the rule of this Court.

It appears by the return of the officer that the defendant's case on appeal was served 4 April, 1911; but he testifies by affidavit that this return is not true in fact, and that the case was actually served 14 September, 1911, long after the lapse of the extended time. In his justification, it may be said that he merely signed the return in the presence of the counsel of plaintiff and defendant, at their request, or with their assent, the plaintiff's counsel expressly reserving all of his client's rights, and especially the right to object to the service as being too late. But officers should make true returns as to time and manner of service, and if they do not, the reason for misdating a return, or for any other inaccuracy, should be explained in the return—that is, the real facts should be fully stated. In this case no copy of the case on appeal was served upon the defendant's counsel, as admitted by the officer. He should have stated this fact in the return, and also the other undisclosed matters which are inconsistent with the return. But after all that can be said, the fact remains that there was no service of a case on the plaintiff within the time prescribed by law, or within the extended time, and the motion of the plaintiff is granted.

The appeal of defendant is dismissed, and judgment will be entered in the court below for the plaintiff, if it has not already been done.

Appeal dismissed.

LOUIS WACKSMUTH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 November, 1911.)

1. **Appeal and Error—Objections and Exceptions—Answers of Witness—Evidence—Motion to Strike Out—Procedure.**

If an answer by the witness to a competent question is not excepted to, the competency of the answer will not be considered on appeal under an exception noted to the question. The objecting party should either have excepted to the answer at the time it was made or move the trial judge to strike it from the evidence.

2. **Railroads—Negligence—Relief Department—Acceptance of Benefits—Written Contract—Parol Evidence.**

The word "benefits" as ordinarily used in the regulations of a railroad company's relief department does not include hospital treatment and medical attention; and as it is the acceptance by a member of that department of the benefits thereunder which may, in proper cases, bar his recovery for damages for a personal injury negligently inflicted by the company, and as the act of acceptance, when in dispute, is not included in any part of the written contract embraced in the regulations, it may be shown or disproved by parol evidence of the circumstances connected with it.

3. **Railroads—Negligence—Relief Department—Acceptance of Benefits—Contracts—Evidence.**

When in defense to an action for damages for personal injuries inflicted upon an employee, a railroad company relies upon the acceptance of benefits by the employee as a member of its relief department as a bar under the rules and regulations of the department, it is competent for the plaintiff, as tending to avoid the bar, to show that he had accepted the benefits under the assurance of the defendant that it would do certain things in regard to keeping him as an employee, etc., which it had failed to do, and that, relying on this promise, he had accepted the benefits; and evidence in this case *Held* sufficient to sustain a verdict in plaintiff's favor on the issue as to whether the plaintiff, after his injury, voluntarily accepted the benefits under his contract.

4. **Appeal and Error—Instructions—Presumptions.**

When the charge of the trial court is not set out in the record on appeal it is assumed that he fully explained to the jury the significance of an issue submitted and the bearing of the evidence thereon.

5. **Railroads—Negligence—Relief Department—Acceptance of Benefits—Promise—Contracts—Burden of Proof—Evidence—Questions for Jury.**

It is a voluntary acceptance by an employee, a member of a railroad company's relief department, of the benefits of that department, after an injury has been inflicted, that bars his right to recover damages from the company; and when the defense in the action is that the plaintiff had promised to accept the benefits, it is necessary for the defendant to show an acceptance of the promise and its performance thereof in order to render the defense available. *King v. R. R., post*, 44, cited as controlling.

6. **Railroads—Negligence—Relief Department—Acceptance of Benefits—Equity—Credits on Judgment—Procedure.**

As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered.

CLARK, C. J., concurs in result.

APPEAL by defendant from *Whedbee, J.*, at June Special Term, 1911, of EDGECOMBE.

This is an action to recover damages for personal injuries caused, as the plaintiff alleges, by the negligence of the defendant.

The defendant denies negligence, alleges that the plaintiff was guilty of contributory negligence, and specially pleads, as a defense, that the plaintiff was a member of its relief department, and that after his injury he accepted benefits from the department.

There was evidence that the plaintiff was injured on 18 April, 1904, in a collision, while performing his duty for the defendant as engineer, and without fault on his part.

It was admitted that after his injury, four checks, aggregating $155, were sent to him from the relief department as benefits.

The plaintiff did not collect the money on the checks, and on 29 August, 1904, wrote a letter to the superintendent of defendant, containing the following proposition:

"If you, as the proper representative of the A. C. L., will give me steady work at a salary of $4.50 per day and I to be employed in the shops at Rocky Mount and to break in new engines and such other similar work that will not require me to make long runs or do service at night, and give me further guarantee that I shall remain in the above employment for a term of not less than fifteen years at a salary of not less than $4.50 per day, steady time, and with the further privilege of returning to my regular run or daylight run, going out of Rocky Mount, whenever my physical condition will admit of the same, I will release the A. C. L. from any further claims for damages resulting from the above-named accident. It being agreed that you are to allow me also the amount agreed to in your letter of 1 August, and the amount that I am entitled to from the relief department."

The superintendent replied, inviting the plaintiff to Wilmington, and saying: "I think it is better for us to talk over the matter about which you have written."

The plaintiff testified that he went to Wilmington and saw the superintendent, and that he agreed to give him employment and to look out and care for him, and that in consequence of these promises he collected the checks.

There was evidence to the contrary.

The defendant offered evidence tending to show that it had contributed to the relief department, but no issue was submitted or requested on this question.

The rules and regulations of the relief department are fully stated in *Barden v. R. R.*, 152 N. C., 318, and in *King v. R. R.*, *post*, 44, and *Nelson v. R. R.*, *post*.

There was evidence tending to prove negligence.

The jury returned the following verdict:

1. Did the plaintiff voluntarily become a member of the relief department of defendant and execute the agreement introduced in evidence? Answer: Yes.

2. Did the plaintiff, after his alleged injury, accept benefits under said contract, and if so, in what amount? Answer: Yes, $155.

3. Was the plaintiff induced to cash the relief checks and accept benefits under said contract, upon the promise and agreement of defendant to furnish him such work or employment as he might thereafter be able to perform, and to take care of him as an old employee? Answer: Yes.

4. If so, did the defendant comply with its agreements? Answer: No.

5. Was the plaintiff injured by the negligence of the defendant company? Answer: Yes.

6. Did the plaintiff, by his negligence, contribute to his own injury? Answer: No.

7. What damage is plaintiff entitled to recover of defendant? Answer: $7,500.

There was a judgment in favor of the plaintiff, and the defendant excepted, assigning the following errors:

First exception. For that the court erred in allowing the plaintiff, in answer to question of plaintiff's counsel, "How much did you suffer?" over the defendant's objection, to answer, "Suffered all kinds of troubles with doctors, thinking they were doing justice by me; kept telling me I would be all right, and I was continually having trouble."

This exception is upon the ground that both question and answer are improper and incompetent and should have been excluded.

Second exception. For that the court erred in allowing the plaintiff, under the defendant's objection, to testify to what passed between him and the superintendent, as follows:

Q. And you went to see the superintendent about your letter of 29 August and his reply of 10 September. Tell the jury what passed between you.

A. The superintendent said that in regard to entering into a contract, they did not do such a thing (this is as I understood him to say), and I told him my reasons for it: that I thought there might be some changes around the railroad, as there had been in the past, and I thought best to have a contract, and he said: "We are likely to stay as long as you," and I said that might be true; and he said, "Haven't we always looked out for old employees?" I said, "Yes," and I insisted that in case I could not run on the short-cut, as my nerves were not right and I would want to be on the safe side, that they give me something else to do, and he said to the manager, "Isn't there going to be a light run put on to Fayetteville, and maybe that will suit Mr. Wacksmuth?" And I said maybe it would; that all I wanted was something in case I couldn't run, so I would have something to do; and he said, "Go back, and don't work until you feel stronger, and put in your application for this run, and we will look out for you," and I said, "I am going to have my relief check signed," and I think I also signed for my watch, pin, etc.

Q. What did he do that first thing? A. He touched me and said, "Go back," they would look out for me; and the manager said he knew I was a good workman, that he had passed through the shops and seen me at work, and he knew I was a good workman, and he left me with the impression——

Q. He told you that they would care for you, and he said they always took care of old men. The last thing he said to you was that you were to go back and they would take care of you, and you went and cashed those checks? A. Yes; I went from there down to Mr. B.'s office, an architect in Wilmington, and told him what I had done.

This exception is upon the ground that the same is irrelevant and incompetent, for that (1) it does not constitute any promise or agreement which is sufficiently explicit to make the basis of a contract, and (2) it contradicts by parol the express terms and provisions of a written contract, and should have been excluded.

Third exception. For that the court erred in allowing the plaintiff, in answer to his counsel's question, "Why did you cash the relief checks?" to state, under defendant's objection, that it was "with the promise that they would look out for me."

This exception is upon the ground that the question and answer are both irrelevant and incompetent, in that they contradict by parol the express terms of the written contract or agreement.

Fourth exception. For that the court erred in refusing to give the special instruction, numbered 1, asked for by the defendant, as follows:

"The defendant prays the court to instruct the jury that there is no evidence that plaintiff was induced by the defendant to accept the relief benefits."

This exception is upon the ground that there was no such evidence, and the court should have so instructed the jury.

Fifth exception. For that the court erred in refusing to give the special instruction, numbered 5, asked for by the defendant, as follows:

"Before you can answer the issue, Was plaintiff induced to accept the benefits by the defendant? you must find the facts from the evidence that the defendant knowingly, purposely offered and agreed to give plaintiff indefinite employment, and that this was done to induce him to accept the benefits and release his right of action. There is no evidence of this, and you are instructed to answer the issue 'No.'"

This exception is upon the ground that the instruction asked for was a correct statement of the matter necessary to be found before the issue could be answered in favor of the plaintiff, and that there was no evidence upon which said finding could be based, and the instruction should have been given.

Sixth exception. For that the court erred in using the following language in the general charge to the jury, to wit:

"If you find as a matter of fact that the plaintiff went to Wilmington, and the general superintendent promised and agreed and said to him that if he would go back and not sue the company that he would see that he was taken care of and would be given such work as he would be able to do, and that by reason of these representations he did cash his checks, then I charge you that that would be such an inducement, and you ought to answer the third issue 'Yes'; but if, on the other hand, they did not induce him to, or did not intend to induce him to cash those checks, but that he did it voluntarily or without promises, then you should answer that issue 'No.' Upon this issue the burden is on the plaintiff. What is meant by the burden is that the evidence of one party outweighs the evidence of the other; in other words, if upon this issue the evidence is equally balanced, then the answer would be against the plaintiff, because the plaintiff has the burden of the issue. If the testimony of the plaintiff outweighs or bears down the evidence of the defendant, then he is said to have carried the burden, and it would be your duty to answer this issue 'Yes.'"

This exception is upon the ground that there was no evidence offered by the plaintiff from which such a finding of fact as is contemplated in that part of the charge quoted could have been made.

Seventh exception. For that the court erred in refusing to grant the defendant's request for judgment of nonsuit at the close of the plaintiff's evidence, and again at the close of all the evidence.

H. A. Gilliam and L. V. Bassett for plaintiff.
F. S. Spruill for defendant.

ALLEN, J., after stating the case: An examination of the record shows that no exception was taken to the answer of the witness embraced in the first assignment of error. The objection was to the question, and it was clearly competent to ask the plaintiff as to the extent of his injuries, and for him to state how much he suffered; and if the defendant thought the answer was not responsive, it was its duty to move to strike it out.

This is fair to the judge and the parties, as it gives an opportunity to correct any error that has been committed; and the judge may well conclude when objection is made to a question, which is proper, and none to the answer, that it is not regarded of sufficient importance to note an exception, or that it is unobjectionable.

"Defendant's remedy was to promptly move to strike out the objectionable testimony, and by the failure of its counsel to adopt this course, any and all right which the defendant may have had to object thereto was waived." 8 Ency. of Pl. and Pr., p. 134.

The remaining assignments, as indicated in the brief of the appellant, are intended to present three questions:

(1) The plaintiff having admitted that he accepted benefits, is it competent to prove by parol that he was induced to do so by the promise of the defendant?

(2) If such evidence is competent, was the evidence introduced by the plaintiff sufficient to sustain a finding that the promise was made?

(3) If the promise was made, would it relieve the plaintiff from the legal effect of the acceptance of the benefit?

The term "benefits," as used in the regulations of the department, has a definite meaning, and does not include hospital treatment and medical attention, and it is the acceptance of benefits, not the agreement to do so, which under certain conditions may bar a recovery. The acceptance of the benefit is an act of the party, which is not evidenced by any writing, and when its effect is in dispute, it is competent to show the circumstances connected with it.

It is in this respect that *Aderholt v. R. R.,* 152 N. C., 411, and *Von Norstrand v. R. R.,* 67 Kan., 387, are distinguishable from the case at bar, as in each of those cases there was a written release.

We think the evidence was competent, and that it was sufficient to be submitted to the jury on the third issue.

There was evidence that the plaintiff received the checks for benefits; that he wrote the superintendent of the defendant and submitted a proposition of settlement, which included future employment, and said he would release the defendant if it would give him this employment; that the superintendent invited him to see him in order that they might talk the matter over; that he went and that in the conversation the superintendent said that "in regard to entering into a contract, they did not do such a thing (this is as I understood him to say), and I told him my reason for it: that I thought there might be some changes around the railroad, as there had been in the past, and I thought it best to have a contract; and he said, 'We are likely to stay as long as you,' and I said, 'That might be true,' and he said, 'Haven't we always looked out for old employees?' I said, 'Yes,' and I insisted that in case I couldn't run on the short-cut, as my nerves were not right and I would want to be on the safe side, that they give me something else to do; and he said to the manager, 'Well, isn't there going to be a light run put on to Fayetteville, and maybe that will suit Mr. Wacksmuth?' And I said maybe it would; that all I wanted was something in case I couldn't run, so I would have something to do; and he said, 'Go back, and don't go to work until you feel stronger, and put in your application for this run, and we will look out for you,' and he said, 'You go back to Rocky Mount and we will look out for you,' and I said, 'I am going to have my relief checks signed,' and I think I also signed for my watch, pin, etc. He touched me and said, 'Go back,' that they would look out for me," and that, relying on what was said to him, he then collected the benefit checks, and this, if believed, justified the jury in answering the third issue "Yes."

The charge of his Honor is not set out, but as there is no exception to it, we must assume that he fully explained to the jury the significance of the issue, and the bearing of the evidence.

If the evidence was competent and was sufficient to sustain the verdict, does the acceptance of benefits, induced by the promise of the defendant, which it failed to perform, bar a recovery?

In the consideration of this question, it must be remembered that the defendant is not relying on the promise.

It does not say that the plaintiff has accepted a new promise of future employment in satisfaction of his claim for damages, and therefore he must declare for breach of the promise, but, on the contrary, it says no promise was made.

It seems to us that a fair interpretation of the verdict is conclusive against the defendant, on the principles declared in *King v. R. R., post,* 44.

The jury has found that there was a contract between the plaintiff and the defendant, and that by its terms the plaintiff agreed to release the defendant from claims for damages on account of negligence, upon payment to him of the benefits and giving him employment, and that the defendant has broken the contract. If so, the acceptance of the benefits did not constitute the settlement, but an act done in furtherance of it. *Dalrymple v. Craig,* 70 Mo. App., 155.

The contract must be considered as a whole, and if treated as an accord and satisfaction or as a contract with dependent stipulations, the defendant must show performance in order to rely on it.

Our views, as to the controlling principles when an accord and satisfaction is pleaded, are stated in the *King case,* and it is unnecessary to repeat them.

It is also well settled that "one relying on a contract of compromise and settlement calling for the performance by him of certain acts, must show a performance of the conditions imposed on him by such agreement." 8 Cyc., 534.

This is declared to be the law in *Quarles v. Jenkins,* 98 N. C., 261, where the Court says: "The court, therefore, properly instructed the jury, in effect, that if the settlement alleged was to be final, on conditions to be observed and performed on the part of the defendant, and he failed to observe and perform the same according to the terms as agreed upon between the parties, then there was no such settlement and discharge."

The case of *Armistead v. R. R.,* 108 La. Ann., 173, is in principle like this. There the plaintiff's boat was injured by the negligence of the defendant, and he brought an action to recover damages. The defendant pleaded a compromise and settlement, and it was held that the plea was not good because it had promised to furnish a steamboat and had failed to do so, the Court saying: "The defendant violated the compromise, and then voluntarily canceled it, and is, therefore, not in a position to plead it in bar of plaintiff's action."

We conclude that the plaintiff was entitled to judgment upon the verdict.

On the trial, the plaintiff offered to return the amount he received as benefits.

This was proper, and the defendant is entitled to have this sum credited on the judgment recovered.

We find

No error.

CLARK, C. J., concurs in the result upon the ground that the contract of the plaintiff with the so-called relief department is denounced as null and void by the provisions of the State statute, Rev., 1646 (the Fellow-servant Act), and also by section 5 of the Federal Employer's Liability Act of 22 April, 1908, and refers to his concurring opinion in *King v. R. R., post,* 66.

LAFAYETTE KING v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 15 November, 1911.)

1. **Railroads—Relief Departments—Benefits Accepted—Consideration—Burden of Proof.**

When a railroad company sets up as a defense to an action for personal injury that the plaintiff was a member of its relief department and was concluded under the rules and regulations of that department, by accepting benefits, from bringing his action, whether a release, accord and satisfaction, or by whatever name called, and it appears that the defendant had full control of the department, with the power to make or alter the rules and regulations at will and to fix the membership fees, the burden is upon the defendant, relying upon the binding effect of the rules and regulations as a contract, to show that on its part it has paid a valuable consideration by introducing evidence of what it has paid or done for the support of the department, and it must be made to appear that the consideration was not so small that a person of ordinary discernment and judgment would consider that the defendant had paid nothing.

2. **Same—Guarantee.**

For a railroad company to avail itself of the defense that the plaintiff was a member of its relief department and accepted benefits thereunder, and could not recover damages for defendant's negligence in injuring him, under the rules and regulations of the department, a valuable consideration must be shown, and the mere fact that the defendant had guaranteed by contract to pay all the operating expenses of the department and to provide it with necessary facilities is not of itself sufficient evidence thereof, the rules and regulations being formulated by defendant and under its control.

3. **Railroads—Relief Department—Members—Privity of Contract.**

There is privity of contract between a railroad company having a relief department for which it furnishes facilities and operating expenses and an employee, a paying member of that department, and a contract may be sustained, upon a valuable consideration shown, that the employee, in proper instances, may not receive the benefits of the department and then sue for damages for a personal injury alleged to have been received owing to the defendant's negligence.

4. **Railroads—Relief Department—Benefits—Voluntary Acceptance—Public Policy—Interpretation of Statutes.**

A contract between a railroad company and its employee giving the latter the choice, after the injury has been received, of maintaining his action for damages for personal injuries inflicted by the former or relinquishing his right of action by voluntarily accepting the benefits of the relief department, if he is a member, is not against public policy or in contravention of the statutes invalidating agreements between employer and employee which exempt the employer from its liability for negligence.

5. **Railroads—Relief Department—Benefits—Voluntary Acceptance—Fraud and Undue Influence—Surrounding Conditions—Master and Servant.**

A voluntary acceptance by an employee of a railroad company of the benefits of the latter's relief department so as to release his cause of action for damages arising from the negligence of the company, must be free from fraud and undue influence, by which is meant a controlling influence, impelling him to act as otherwise he would not do, and there may be considered as relevant circumstances the facts that the department was under the control of the master, that the employee might be influenced under this relationship, the absence or presence of the employee's friends or relations, and the presence of employees of the company likely to influence his choice, the physical or mental condition induced by the injury existing at the time of choosing, the general advantage the department holds out for those who are members, and the benefit to the company in causing its employee to determine whether he will sue or accept the benefits under the department.

6. **Railroads—Relief Department—Member—Voluntary Acceptance—Knowledge—Opportunity—Fraud.**

An employee of a railroad company is required to exercise diligence in protecting his rights in choosing whether he will sue the railroad company for damages for a personal injury sustained or accept the benefits of the relief department, of which he was a member, and he will not be excused on the ground of want of knowledge, where he has had the opportunity to inform himself.

7. **Railroads—Relief Department—Corporations—Ultra Vires.**

It is not *ultra vires* for a railroad to establish a relief department for the benefit of employees who are members of it, in case of sickness and accident, charging the members a fee and contributing to its support and efficiency.

8. **Railroads—Relief Department—Benefits Received—Personal Injuries—Negligence—Judgment—Credits.**

When an employee of a railroad company has accepted benefits from its relief department under conditions permitting recovery for personal injuries negligently inflicted on him, the amount of the benefits received should be credited on the judgment.

CLARK, C. J., and BROWN and WALKER, JJ., concur in result; HOKE, J., concurs in opinion as written.

APPEAL from *Whedbee, J.,* at October Term, 1910, of NEW HANOVER.

The plaintiff brings this action to recover damages for personal injuries caused, as he alleges, by the negligence of the defendant. The defendant denies negligence and alleges, as a defense, that the defendant maintains a relief department; that the plaintiff was a member thereof, and that after he was injured he accepted benefits from said department, which, under its rules and regulations, bars a recovery.

Evidence was offered by the plaintiff in support of his contention. The defendant introduced evidence in rebuttal, and also introduced the rules and regulations of said department, which are very fully stated in the report of *Barden v. R. R.,* 152 N. C., 318.

Section 4 of the rules and regulations provides: "The company shall have general charge of the department, guarantee the fulfillment of its obligations as determined by these regulations, take charge of all moneys belonging to the relief fund, and be responsible for their safe-keeping; pay into the fund interest at the rate of 4 per cent per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof."

No evidence, however, was introduced that the defendant had contributed any money to the funds of the department or for its maintenance.

There was evidence that the plaintiff was entitled to be paid benefits for a period of eight months, and that he was paid for about four months.

It appears from the rules and regulations:

(1) That the relief department is a department of the defendant.

(2) That the rules and regulations thereof are prescribed by the defendant.

(3) That under these rules and regulations the defendant has control of the department and of its money.

(4) That the rules and regulations can be changed by the defendant without the consent of the members of the department, and that they cannot be changed except with the consent of the defendant.

(5) That the object of the department is the establishment and management of a fund, to be known as the "Relief Fund," for the payment of definite amounts to employees contributing thereto, who are to be known as "members of the Relief Fund," when under the regulations they are entitled to such payment by reason of accident or sickness, or, in the event of their death, to the relatives or other beneficiaries designated by them with the approval of the superintendent.

The relief fund will consist of contributions from members thereof, income derived from investments and from interest paid by the company and advances by the company, when necessary, to pay benefits as they become due.

(6) That the defendant is not a member of the department, but it is provided: The company shall have general charge of the department, guarantee the fulfillment of its obligations as

determined by these regulations, take charge of all moneys belonging to the relief fund, and be responsible for their safekeeping; pay into the fund interest at the rate of 4 per cent per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof.

(7) That all employees of the company who, under the regulations, are contributors to the relief fund shall be designated as "members of the Relief Fund."

There shall be five classes of members. The highest class in which an employee may be a member shall be determined by his regular or usual monthly pay, as follows:

Monthly Pay.	*Highest Class.*
Less than $35	First.
$35 or more, but less than $55	Second.
$55 or more, but less than $75	Third.
$75 or more, but less than $95	Fourth.
$95 or more	Fifth.

For employees paid by the hour, trip, piece, or in any other way than by the month, the highest class shall be determined by the usual amount of earnings in a month.

(8) That the word "contribution" wherever used in these regulations shall be held and construed to refer to such designated portion of the wages payable by the company to an employee as he shall have agreed, in his application, that the company shall apply for the purpose of securing the benefits of the relief fund; or to such cash payment as it may be necessary for a member to make for said purpose.

Contribution for full membership shall be made monthly in advance, at the following rates: First class, 75 cents per month; second class, $1.50; third class, $2.25; fourth class, $3; fifth class, $3.75.

(9) Wherever used in these regulations, the word "disability" shall be held to mean physical inability to work *by reason of sickness or accidental injury*, and the word "disabled" shall apply to members thus physically unable to work. The decision as to when members are disabled and when they are able to work shall rest with the medical officers of the department.

The decision as to whether disability at any time shall be classed as due to sickness or due to accident, and as to whether any disability shall be considered a relapse or an original disability, shall rest with the medical officers of the department.

(10) That the following benefits will be paid to members or beneficiaries entitled thereto in accordance with the provisions of these regulations:

Payment for each day of disability classed as due to accident for a period not longer than fifty-two (52) weeks, as follows: To a member of the first class, 50 cents; second class, $1; third class, $1.50; fourth class, $2; fifth class, $2.50; and at half these rates thereafter during the continuance of disability.

Also payment to or in behalf of the members of such amounts for necessary surgical treatment as may be approved by the chief surgeon; and provision by the department for free surgical treatment of the member in one of the hospitals under its control when requested by a medical examiner of the department and authorized by the superintendent or chief surgeon. No member shall have authority to contract any bills against the department, and nothing herein shall be held to mean or imply that the department shall be responsible for the payment of such bills as a member shall contract or his surgeon may charge. Bills for surgical attendance, to be considered by the department, must be made out against the member and must be itemized.

Payment, in accordance with the conditions prescribed in the regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, $250; second class, $500; third class, $750; fourth class, $1,000; fifth class, $1,250. Also payment of $250 for each additional death benefit of the first class to which the beneficiary is entitled.

(11) That employees are required to sign a written application before joining the relief department, in which it is provided: "I also agree that, in consideration of the amounts paid and to be paid by the said company for the maintenance of said relief department, and of the guarantee by said company of the payment of said benefits, the acceptance by me of bene-

fits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury; and further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said relief department, of all claims against said relief department, as well as against said company and all other companies associated therewith, as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable and all obligations of said relief department and of said company created by my membership in said relief fund shall thereupon be forfeited without any declaration or other act by said relief department or said company."

(12) That section 62 of the rules and regulations is as follows: "62. In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any companies associated therewith in the administration of their relief departments.

"The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith as aforesaid, for damages arising from or growing out of such injury; and further, in the event of the death of a member, no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of all claims against the relief department, as well as against the company and all other companies associated therewith as aforesaid, arising from or growing out of death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the company or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed.

"If a claim for damages on account of injury to or death of a member shall be settled by the company or any company associated therewith as aforesaid, without suit, or by compromise, such settlement shall release the relief department and the company from all claims for benefits on account of such injury or death."

At the conclusion of the evidence, his Honor stated that he would charge the jury "that the defendant company, having paid a part of the relief money to the plaintiff and the plaintiff having accepted it, whether it was the full amount or not, if he accepted any part of it, he could not recover," and in deference thereto the plaintiff submitted to judgment of nonsuit and appealed.

Kellum & Loughlin and Herbert McClammy for plaintiff.
Davis & Davis and George B. Elliott for defendant.

ALLEN, J., after stating the case: The plaintiff having introduced evidence tending to prove that he was injured by the negligence of the defendant, it follows that there was error in the ruling of his Honor, unless the acceptance of benefits from the relief department by the plaintiff, after his injury, operates to release the defendant company from liability. We think it does not have this effect under the evidence in this case, for two reasons:

1. It does not appear that there is any consideration for the release, moving from the defendant. The answer alleges that the defendant has expended large sums in maintaining the relief department, and in contributions to the fund from which

benefits are paid to members; but these are matters of defense, and under our system of pleading are deemed to be denied by the plaintiff, and no evidence was introduced in support of the allegations of the answer.

The evidence does not disclose that the defendant has paid one dollar for operating expenses or otherwise, or that the plaintiff has received anything that he has not paid for by his own contributions. The only reference in the evidence to the payment of any sum by the defendant is in the following question and answer: "I ask you if all this money that has been paid into the relief department, and upon which the relief department has been operated, has not been the wages taken out of the laborers of the Atlantic Coast Line?" Answer: "No, sir."

The authorities are uniform that a release must be founded on a valuable consideration, and that the plea is not good unless the consideration is alleged. A. and E. Ency. Pl. and Pr., vol. 18-92; Story Eq. Pl., sec. 797; 1 Dan. Ch. Pr., 670; *Hale v. Grayon,* 99 Ky., 173; *Maness v. Henry,* 96 Ala., 458; *Swan v. Benson,* 31 Ark., 730; *Scott v. Scott,* 105 Ind., 584.

In *Crawley v. Timberlake,* 36 N. C., 460, *Chief Justice Ruffin* says: "A court of equity does not sustain these shorthand bars, such as a release, a stated account, and the like, unless they be pleaded as not only existing instruments, but also as being fair and wise, and proper to be equitably enforced. . . . So, with respect to this particular subject of a release now before us, *Lord Redisdale* states (in *Hughes v. Kearney,* 1 Sch. and Lef.) that the plea of release *must* set out the *consideration* upon which it was made, if it be impeached in that point. . . . In other words, the release, unless fairly obtained and on a proper consideration, ought not to preclude the court from going into the case and dealing out justice to the parties according to its real facts."

This case was approved in *Shaw v. Williams,* 100 N. C., 281, and in *Boutten v. R. R.,* 128 N. C., 341, the Court quotes with approval this language from *Shaw v. Williams, supra:* "And so every release must be founded on some consideration; otherwise, fraud must be presumed."

Some of the authorities speak of transactions of this character as a release, and others as an accord and satisfaction, but by whatever name it is called, it is pleaded by the defendant as a binding contract, existing between it and the plaintiff, and a promise without consideration cannot be enforced. If it is necessary to a good plea to allege the consideration, the party relying on the defense assumes the burden of proving the allegations as made. He is not required to prove a full consideration, but it must be valuable, and as such must not be so small as to cause one of ordinary discretion and judgment to say he paid nothing. *Fullenweider v. Roberts,* 20 N. C., 420; *Worthy v. Caddell,* 76 N. C., 86.

The defendant contends, however, that in the absence of evidence proving the payment of a consideration, the guarantee by the defendant to fulfill the obligations of the department, and its agreement to supply the necessary facilities for conducting its business and to pay all the operating expenses furnishes a consideration. Ordinarily this would be true, but we cannot concede its sufficiency, standing alone, to support a release of the plaintiff's cause of action, when considered in connection with the other regulations of the department.

The department has been established by the defendant, and its rules and regulations made by it. Under these rules and regulations it retains the control of the department, with the power to make changes as it sees fit, and it determines the contributions of members, and may decrease or increase them.

It is, therefore, possible for the defendant to fix the amounts to be contributed by members large enough to insure it harmless from loss on account of accident and negligence, and to throw on the employees a burden which does not rightfully belong to them.

If such a result should be reached, and it appeared affirmatively that the defendant paid nothing under its rules and regulations, the promise of the defendant "to guarantee, etc.," would be promises incorporated in the regulations by the defendant, without any expectation of being called on to perform them, and would not furnish a consideration, and under such circumstances the acceptance of benefits would not affect the right to recover.

2. If a consideration had been proven, it appears, according to the evidence of the plaintiff, that he was entitled to receive benefits for eight months, and that he was paid for four months.

In the consideration of this phase of the case it must be remembered that it is the "acceptance of benefits," not the acceptance of a promise to pay benefits, that bars a recovery.

The transaction partakes of the nature of an accord and satisfaction, which to be effectual must be performed in its entirety. If performed in part only, the original right of action remains and the party to be charged is allowed what he has paid in diminution of the amount claimed.

Chief Justice Bleckley states the rule, with its qualifications, in *Railway Co. v. Clem,* 80 Ga., 539. He says: "As long as the accord is executory, although it is partially performed, the original cause of action is not extinguished, and an action may be brought upon it, and the remedy of the defendant is to plead his part performance as a satisfaction *pro tanto.* He gets credit for all he has paid upon it, but the right of action is not extinguished by an accord, merely, without complete satisfaction, where the parol contract is that performance, not mere promise, is to constitute the satisfaction, though if a promise is to constitute it before performance, then the accord is executed by the promise."

Blackstone says: "An accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions on this account." 3 Bl. Com., 15.

"Accord executory without performance accepted is no bar. Accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction." Bacon Abr., title "Accord and Satisfaction," A. and C.

In *Peytoes' case,* 9 Co., 79, it is said: "And every accord ought to be full, perfect, and complete, for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed."

These and other authorities to the same effect are cited with approval in *Kramer v. Heim,* 75 N. Y., 574, and in conclusion the Court there says: "The doctrine which has sometimes been asserted, that mutual promises, which give a right of action, may operate and are good as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord, and the original obligation remains in force."

The following authorities announce the same rule: Lawson R. and R., vol. 5, secs. 2567-8; Par. Con., vol. 2, p. 683, 5th Ed.; Cyc., vol. 1, p. 315, and cases in note; Clark Con., 491.

There are three cases bearing directly on the effect of the payment of a part of the benefits due under the provisions of a relief department on the original cause of action for negligence: *Penn Co. v. Chapman,* 220 Ill., 428; *Johnson v. R. R.,* 58 S. C., 488, and *Petty v. Brunswick R. R.,* 109 Ga., 666. In the Illinois case it is held that part performance does not extinguish the right of action for negligence, and the cases from South Carolina and Georgia hold to the contrary.

These last cases from South Carolina and Georgia proceed upon the idea that by the terms of the relief department then before the Court, the employee had stipulated that the acceptance of any benefit released the right of action, as appears from what is said in the *Petty case.* "Petty (the plaintiff) therein expressly stipulated that acceptance by him from the relief and hospital department of any of the benefits provided for by its regulations should operate, without more, to release the defendant company from all claims for damages he might have against it"; and it is upon this ground that the case is distinguished from *Railway Co. v. Clem, supra.* We do not so understand the rules and regulations before us.

In an extended note to *Johnson v. Fargo,* 6 Am. and Eng. Ann. Cases, practically all the cases considering the terms of relief departments and their legal effect are collected, and among others the three above referred to. After stating the rule adopted by the Georgia and South Carolina courts, the editors say: "It will be observed that this doctrine is not only opposed to the reasoning in *Penn Co. v. Chapman,* but is inconsistent with the well-considered cases, cited *supra,* holding that it is the receipt of benefits under the contract, and not the contract itself, that binds the employee."

We conclude, therefore, that the weight of authority and the reason of the thing favor the rule that a payment of a part of the benefits to which the employee is entitled does not prevent the prosecution of an action to recover damages for negligence, in the absence of an express stipulation that the acceptance of a part shall have that effect, and we so hold.

This disposes of the appeal, but the rules and regulations of the relief department are in evidence, and the question has been fully argued as to the effect of an acceptance of all the benefits to which an employee is entitled, from a fund to which the defendant has contributed, on his right of action for negligence, and as the question will necessarily arise again, it is our duty to consider it.

The question is undecided by this Court. The views expressed in *Barden v. R. R.,* 152 N. C., 318, relied on by the plaintiff, are entitled to great respect, emanating, as they do, from a member of this Court of learning and of much capacity for research; but the point in controversy here was not raised in that case.

In the *Barden case* no benefits were paid to the employee and the defendant railroad company did not rely on the provisions of the relief department as a defense. On the contrary, both plaintiff and defendant admitted the validity of the rules and regulations of the department.

The case in brief was this: The plaintiff alleged in his complaint:

(1) That the defendant was a railroad corporation.

(2) That it maintained a relief department.

(3) That as a part of its relief department it maintained a hospital.

(4) That in this hospital it employed surgeons and physicians.

(5) That he was an employee of the defendant and a member of the relief department.

(6) That as such he was entitled to be treated in the hospital when sick or disabled.

(7) That he was suffering from fistula and was admitted to the hospital and there negligently treated by the physicians.

The argument of the plaintiff was that the relief department was an agency of the railroad; that the hospital was a part of the department; that the physicians were employed in the hospital, and the conclusion deduced was that the physicians were agents of the railroad and therefore it was responsible for their negligence.

The defendant demurred to the complaint upon the ground that it did not state a cause of action, in that it was not alleged that the defendant failed to exercise due care in the selection of the physicians. The demurrer was overruled by the Judge of the Superior Court, but on appeal this ruling was reversed and the complaint held to be insufficient.

We therefore regard the question as an open one, presented for our decision.

It has been considered by the highest courts of Alabama, Georgia, South Carolina, Maryland, Pennsylvania, New Jersey, New York, Ohio, Indiana, Illinois, Iowa, and Nebraska, and by the Circuit Courts and the Circuit Courts of Appeal of the United States, and with two exceptions it has been held that an acceptance of all the benefits under the rules and regulations of a relief department, when it is the voluntary act of the employee, and is free from undue influence or fraud, bars an action for negligence. The exceptions are *Pittsburg R. R. v. Montgomery*, 152 Ind., 1, which was overruled in *Pittsburg R. R. v. Moore*, 152 Ind., 345, and *Miller v. R. R.*, 65 F. R., 305, which was disapproved on this point on appeal to the Circuit Court of Appeals, 76 F. R., 439.

We do not cite in support of the proposition the English cases of *Clement v. R. R.*, 2 Q. B. Div., 490; *Griffiths v. Dudley*, 9 Q. B. Div., 362, and the *Queen v. Grenier*, 3 Can. Sup. C., 30, p. 50, because they hold that a regulation is permissible which gives no option to the employee to accept benefits or sue, and which compels him to accept the benefits although injured by the negligence of his employer, which we would not follow.

In the cases which have come before the courts, it would seem that every attack conceivable has been made on the relief department.

It has been urged that it is against public policy, that there is no privity of contract between the employee and the railroad, and that there is no consideration to support a release of a right of action, and in reply the courts say, as stated in *Eckman v. R. R.,* 169 Ill., 318:

"'The various courts which have had this question under consideration appear to agree that the stipulation in question is not opposed to sound public policy, but, on the whole, is conducive to the well-being of those whom it immediately affects, inasmuch as many railroad employees, owing to the dangerous character of their employment, are hurt without any culpable negligence on the part of their employer, and inasmuch as the employee retains, until after he sustains an injury, the right to elect whether he will sue his employer for negligence or accept benefits from the association. It also appears to be agreed that the obligation assumed by the employer to maintain and support such association by contributing the funds necessary for that purpose creates a privity of contract between the employer and all the members of the association and at the same time furnishes a sufficient consideration to support such contract.' Substantially the same language and reasoning have been used in the following cases, all of which sustain the sufficiency of such a defense: *Maine v. R. R.* (Iowa), 70 N. W. Rep., 630; *R. R. v. Bell,* 44 Neb., 44; *Donald v. R. R.* (Iowa), 61 N. W. Rep., 971; *R. R. v. Wymore,* 40 Neb., 645; *Vickers v. R. R.,* 71 Fed. Rep., 139; *Leas v. Pennsylvania Co.,* 10 Ind. App., 47; *Ringle v. Pennsylvania Co.,* 164 Pa. St., 529; *Shaver v. Pennsylvania Co.,* 71 Fed. Rep., 931; *Otis v. Pennsylvania Co.,* 71 *id.,* 136; *Johnson v. R. R.,* 163 Pa. St., 127; *Spitzer v. R. R.,* 75 Md., 162; *Fuller v. Relief Assn.,* 67 *id.,* 433; *Graft v. R. R.* (Pa.), 8 Atl. Rep., 206; *Martin v. R. R.,* 41 Fed. Rep., 125; *S. v. R. R.,* 36 *id.,* 655; *Owens v. R. R.,* 35 *id.,* 715. . . . In the case at bar the appellee contributes largely to the fund under its agreement to make up or guarantee deficits, to furnish surgical aid attendance, to pay all the expenses of administration and management, and to become responsible for the safe-keeping of the funds of the relief department."

It is the fact that the employee is not compelled to accept the benefits—that he has the *choice after his injury to accept benefits or to sue to recover damages*—which saves the rules and regulations from condemnation as a contract against public policy or against negligence. To deny this right of exercising his choice to the employee would be equivalent to saying that when injured he can make no settlement with his employer.

"The injured party, therefore, is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for any injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed as from the company's treasury, as a result of litigation. The substantial feature of the contract, which distinguishes it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition." *Johnson v. R. R.,* 163 Pa. St., 127.

The same reasoning meets the objection that the rules and regulations are in violation of the statutes existing in many States, invalidating agreements between employer and employee, having for their object the exemption of the employer from liability for negligence. *Hamilton v. R. R.,* 118 Fed. Rep., 92; *Petty v. R. R.,* 109 Ga., 666; *Pittsburg R. R. v. Moore,* 152 Ind., 345; *Pittsburg R. R. v. Hosea,* 152 Ind., 412; *Donald v. R. R.,* 93 Iowa, 284; *Pittsburg v. Cox,* 55 Ohio St., 497; *Day v. R. R.,* 179 Fed. Rep., 30.

The opinion in the last case was written by *Connor, J.,* and concurred in by *Judges Goff* and *Pritchard,* in which it is said:

"Assuming that the averments of the declaration bring the plaintiff's case within the provisions of the Constitution, and that 'he was injured by an act or omission of a fellow-servant,' as defined and limited by the language of the section, does the contract, set forth in the special plea, waive any of the 'benefits' conferred by said section? It is manifest that, by becoming a member of the relief department, plaintiff did not waive or deprive himself of the right to maintain an action against defendant for an injury sustained by him while in its service as defined by the Constitution 'by an act or omission of a fellow-servant.' There is nothing in the rules and regulations of the relief department which could be averred or pleaded in bar of an action brought by him for such injury; nor did he, by becoming a member thereof, make any 'contract, express or implied,' by which he waived any of the 'benefits' conferred upon or secured to him by the Constitution. Giving the language of the section the most liberal construction possible, nothing more is secured to the employee, injured by the negligence of a fellow-servant, than the right to recover from the common master damages for such injury, in the same manner and to the same extent as if the same acts or omissions were those of the master himself in the performance of a non-assignable duty. We are unable to perceive how, by any possible interpretation, the scheme known as the relief department, or becoming a member thereof, can be said to waive the right of action secured to the employee by the Constitution. As uniformly held by other courts, in which the same contention has been made, the employee does not waive, or agree to waive, any rights to which he is entitled by becoming a member of the relief department. He simply agrees that, after the injury is sustained, and his cause of action accrues, he will elect whether to sue for damages or accept the benefits secured by the relief department; that he will not do both. There is no suggestion that plaintiff made his election under such circumstances or conditions, either mental, moral, or physical, making it inequitable to enforce it. Similar statutes have been enacted, whereby agreements made in advance of an injury, caused by the negligence of a fellow-servant or defective appliances, ways or means, are declared to be invalid. The courts have held that becoming a member of the relief department was not within the letter or spirit of these statutes."

Again, it is contended that the business is that of insurance, and that it is outside of the powers granted to a corporation to do a railroad business. The authorities hold the contrary view. *Maine v. R. R.,* 109 Iowa, 260; *S. v. R. R.,* 68 Ohio St., 41; *Beck v. R. R.,* 63 N. J. L., 232.

In the New Jersey case the Court says: "We must recognize that it (the railroad) has either express or implied power to engage the services of many men, and contract with them as to the compensation they shall receive for their services. Each of such employees is engaged in an employment which subjects him to the hazard of injury and the danger of death. Each is possessed of the liberty to contract with the employer respecting his compensation. A contract by which an employee permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which relief for sick and injured employees is provided, and by which the employer undertakes to manage the fund and furnish the agreed-on relief, is, in my judgment, within the implied powers of the employer, if a corporation. On the part of the employer such a scheme may be deemed likely to increase the efficiency of the force it employs, and on the part of the employee it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not *ultra vires.*"

The following authorities are also in point: *Sturgess v. R. R.,* 60 S. E. Rep., 940; *Fuller v. Relief Assn.,* 67 Md., 436; *Chicago v. Curtis,* 44 Neb., 55; *Chicago v. Bell,* 51 Neb., 462; *Harrison v. R. R.,* 144 Ala., 252; *A. C. L. v. Downing.* 166 Fed. Rep., 850; *Carter v. R. R.,* 115 Ga., 853; *Owens v. R. R.,* 35 Fed Rep., 718; *Spitzer v. R. R.,* 75 Md., 168; *Otis v. R. R.,* 71 Fed. Rep., 136; *Lease v. R. R.,* 10 Ind. App., 57; *Ringle v. R. R.,* 164 Pa., 532; *R. R. v. Edward,* 25 Ind. App., 674; *Brown v. R. R.,* 6 Dist. C. App. cases, 244; *Graft v. R. R.,* 8 Atl. R., 207; *Clinton v. R. R.,* 60 Neb., 692; *Black v. R. R.,* 36 Fed. Rep., 655; *Martin v. R. R.,* 41 Fed. Rep., 126; *Coliazzi v. R. R.,* App. Div., 4th Dept., March Term, 1911; Elliott on Railroads, vol. 3, sec. 1379 *et seq.*

Up to this point we have considered the effect of the voluntary acceptance by the employee of the benefits to which he is entitled, based upon the language of the rules and regulations, and uninfluenced by other matters, and hold that such acceptance operates as a release or an accord and satisfaction of a claim for damages on account of negligence, when based on a consideration moving from the defendant. If, however, the release is not voluntary, and if it is procured by undue influence or fraud, or has no consideration to support it, it will not avail as a defense.

The history of the relief department justifies the courts in subjecting settlements made thereunder to close scrutiny. They seem to have kept pace with the employer's liability acts, and as one of these was passed a relief department would be organized.

The English act, on which most of the American statutes are based, went into effect on 1 January, 1880, and on the same day the owner of a colliery notified his employees they must look to the department in the event of injury by negligence, and from then until now the effort has continued to avoid the increased liability imposed by the acts. In so far as those efforts are legitimate and fair they should be upheld, and no further.

By undue influence is meant a controlling influence, one which impels a person to do an act he would not otherwise do. *Westbrook v. Wilson,* 135 N. C., 402; *In re Abee,* 146 N. C., 274.

As is well said by *Justice Brown In re Will Amelia Everett,* 153 N. C., 85: "Experience has shown that direct proof of undue or fraudulent influence is rarely obtainable, but inference from circumstances must determine it. . . . Undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but when collectively stated may satisfy a rational mind of its existence."

When it is in issue the jury have the right to consider the relation of the parties, the circumstances connected with their relationship, the condition and situation of the parties at the time of the transaction, the adequacy of the consideration, and other relevant facts.

The relation of employer and employee is not one of those regarded as confidential, from which a presumption of fraud or undue influence will arise, but it is recognized by the courts that the employer has great influence in determining the conduct of the employee and may use it to his injury. It is upon this ground that the statutes regulating the hours of labor are sustained, as stated in *Holden v. Hardy,* 169 U. S., 366. "The Legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority." This language was approved by the Supreme Court of the United States in an opinion written by *Mr. Justice Hughes* in *R. R. v. Maguire,* 219 U. S., 552.

It is also competent to consider the fact that the option to accept benefits or sue is in the application for membership, and that the defendant has control of the department and prescribes its rules and regulations. It is true that it is the acceptance of benefits that bars the action, when free from fraud or undue influence, but this acceptance receives its vitality from the clause in the application for membership, or, as is said in the *Maguire case:* "The payment of benefits is the performance of the promise to pay contained in the contract of membership."

The situation of the employee at the time he accepts the benefits, his condition and surroundings, are relevant. Was it soon after his injury and while suffering, or was he surrounded by the employees of the company, with no opportunity to confer with relations or friends?

In Pom. Eq. Jur., vol. 2, sec. 948, it is said: "Whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively." Note, however, that it is not pecuniary necessity and distress which are the basis of the equity jurisdiction, but it is taking advantage of this condition.

Again Pomeroy says, vol. 2, sec. 851: "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessity, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, not essential."

The consideration paid to the employee is important, and may be controlling, but it is not to be determined alone by the amount of benefits paid to the employee, and the proportion this may bear to a fair compensation for his injury.

On the part of the employee it must be remembered that he has contributed to the fund out of which he is paid, and that the department has been established primarily for the benefit of the railroad and not as a charity, and that it has been relieved of liability for negligence in many instances, under its rules and regulations. On the part of the railroad, that the party injured is a member of the relief department, and as such is entitled, upon the payment of a small sum, to hospital treatment and benefits when sick or disabled, or when injured by accident, and to larger benefits at death; that to maintain the department it is necessary to keep up its membership; that the railroad has been compelled to expend large sums in operating expenses, and in contributions to the relief fund—if this appears. When due weight is given to these matters, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and if grossly inadequate, it alone is sufficient to carry the question of fraud or undue influence to the jury. Pom. Eq. Jur., vol. 2, secs. 926-7.

At the last term, this Court said, in *Leonard v. Power Co.,* 155 N. C., 10, on this question: "In *Byers v. Surget,* 19 How., 311, the Supreme Court of the United States says: 'To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud.' And again, in *Hume v. U. S.,* 132 U. S., 411, 10 Sup. Ct., 136 (33 L. Ed., 393): 'It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other.' Our Court, speaking through *Justice Brown,* so declares the law in reference to awards and other transactions, in *Perry v. Insurance Co.,* 137 N. C., 406, 49 S. E., 890. He says: 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators. *Goddard v. King,* 40 Minn., 164, 41 N. W., 659. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption, or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud."

In the enforcement of these principles, relief should be granted with caution. If nothing appears except that the employee has signed the application for membership, the rules and regulations of the department that the employee was not with his friends and that the consideration is inadequate, but not grossly so, relief should be denied. The employee is required to exercise diligence in protecting his rights, and will not be excused on the ground of want of knowledge when he has the opportunity to learn.

If the issue of fraud or undue influence is found in favor of the employee, and he has been injured by the negligence of the railroad, he may recover damages, without returning what he has received as benefits, but this will be allowed in reduction of the damages. *Hayes v. R. R.*, 143 N. C., 125.

There must be a
New trial.

CLARK, C. J., concurs in the result upon the ground that the contract of the relief department of the defendant company is invalid because it is in violation of both the Federal and State statutes which have been passed for the protection of the employees of railroad companies. It is so held because a violation of the State statute, in *Barden v. R. R.*, 152 N. C., 318, and no reason has been shown, in my judgment, to overrule the able and well-considered opinion of the Court in that case which was written by *Mr. Justice Manning.*

The Fellow-servant Act of North Carolina of 1897, now Rev., 2646, giving employees of railroads an action for wrongful death or personal injuries caused by the negligence of the defendant or a fellow-servant or from defective machinery, ways, or appliances of a railroad company, provides: "Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void."

Every employee of the defendant company is required to join this "relief department," and the contract which he signs upon entering its relief department contains this provision: "I also agree that in consideration of the amounts paid by the said company for the maintenance of the said relief department, and the guarantee by the said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of the relief department, for damages arising from or growing out of said injury."

This contract made prior to the injury is invalid because in violation of the express terms of the statute. It is also without consideration, for the evidence in this case does not show that the defendant in fact contributed any money to the department or for its maintenance. It appears from the rules and regulations that said relief department is a bureau of the defendant and that its rules and regulations are prescribed by the defendant. Also, that under those rules and regulations the defendant has sole control of the department and of its money; that the rules and regulations can be changed by the defendant without the consent of the members of the department, and cannot be changed without the consent of the defendant. It was admitted in the argument here and is a well-known fact that no employee of the defendant can remain in its service unless he is a member of this department. The so-called relief department was not established until after the enactment of the act of 1897, called the Fellow-servant Act.

From the above condensed statement of the evidence, it is clear that the sole object of the relief department is for the relief of the railroad company by requiring the employees of that company to raise by a forced contribution out of their salaries and wages a fund out of which all damages for personal injuries or wrongful death caused to employees by the negligence of the defendant shall be paid.

It is public policy as declared by statute that, in case of injury or death resulting to an employee from the negligence of a railroad company or of a fellow-servant, such loss shall fall upon the company whose negligence caused it; and thus the stockholders will see that their officers and agents take proper steps to prevent such negligence and to safeguard by proper care the lives and limbs of its employees. This safeguard is entirely swept away by this device of a relief department whereby the employees are compulsorily required to raise out of their own meager wages a fund of $9 to $45 per annum from each employee, amounting in the aggregate to many hundreds of thousands of dollars annually, out of which fund the damages for the injuries and deaths which may be inflicted upon them by the negligence of the railroad company shall be paid. The defendant is the only railroad company in this State which has resorted to this device.

If, after an injury has been inflicted, there is a fair and free settlement made between the injured party and the company for the damages sustained by the negligence of the corporation, which damages are paid out of the funds of the company, it would be upheld by the courts. But such arrangement needs no previous agreement as is here required to be signed by each employee of the defendant company. Nor should such a settlement be made out of funds raised by involuntary contributions exacted by the company out of the wages of its employees. Nor is it a valid contract to impose upon plaintiff the loss of all he has paid in if he elects to sue or if he leaves the service.

The so-called relief department is also in violation of the Federal Employer's Liability Act of 22 April, 1908. That statute, after giving employees of any railroad company an action for injury caused by the negligence of any railroad company or of fellow-servants, or by reason of any defects in appliances, machinery, etc., provides:

"Sec. 5. *Any contract, rule, regulation, or device whatsoever,* the purpose or intent of which shall be to enable any common carrier to exempt itself from *any liability created by this act,* shall to that extent be void."

The debates in both houses of Congress over the enactment of this section, as preserved in the *Congressional Record,* show that the object of this section was to prohibit these Relief Departments which had sprung up in the several States immediately after the passage of State "Employers' Liability" acts, and which acts had been held valid by courts which, to say the least, were not unfriendly to these great aggregations of capital. The labor associations of the country were powerful enough to have their rights presented in the debates in Congress and to secure the enactment of the above section for their protection. If the above section does not have that effect the mind of man cannot conceive a form of words which will have that effect.

In a very recent case, decided by the United States Supreme Court, 30 October, 1911, *R. R. v. United States,* it was held that when the railroad company was operating a railroad which was "a part of a through highway over which traffic was continually being moved from one State to another," hauled over a part of its road five cars, the couplers of which were defective, two of the cars being used at the time in moving interstate traffic and the other three in moving intrastate traffic, though the use of the last three was not in connection with any car or cars used in interstate commerce, yet, the Federal liability statute applied to said three cars, and the defendant was liable to the penalty for not having automatic couplers thereon, because the act applies *"on any railroad engaged* in interstate commerce." If above decision is controlling, certainly the relief department of the defendant is forbidden by the Federal statute. While the three cars in the above case were not directly in use in interstate commerce, every employee of the defendant company is more or less connected in some way every day and hour with the transportation of through freight or passengers by this company which is "engaged in interstate commerce."

BROWN, J., concurring: I concur in the judgment of this Court granting a new trial, although I cannot concur in all that is said in the opinion.

1. I think it has been fully demonstrated in the opinion in this case by *Mr. Justice Allen,* as well as in my dissenting opinion in the *Barden case,* 152 N. C., 318, that the relief department agreement of the defendant company is valid, not against public policy, not a mere scheme upon the part of the

defendant to evade liability for its own negligence, and in proper cases should be enforced as a bar to actions for damages.

Similar articles of agreement have been in vogue in other parts of this country between other railway companies and their employees and have been invariably upheld. If overwhelming authority and unanimous judicial precedent are worth anything, then the legality of these relief associations and their articles of agreement ought no longer to be questioned.

This should be especially true in this State, for the reason that three successive Legislatures have thoroughly investigated this very relief department of the defendant company, have examined scores of its employees of all grades, and have refused to interfere.

That this is a matter addressed entirely to the wisdom and within the jurisdiction of the General Assembly is expressly declared by the Supreme Court of the United States in the *Maguire case,* 219 U. S., 550, where it is held: "Whether the relief scheme of a railroad company involving contracts with its employees and contributions from both employees and the company, such as the one involved in this case, is a wise and proper scheme which should be approved, or an unwise scheme which should be disapproved by the public policy of the State, is under the control of the legislative power of the State." If this relief association agreement had been found by our General Assembly to work an injustice or hardship to the employee, it would have been destroyed long ago.

2. This association does not deprive the employee of any legal right he has under the law, and does not attempt to. On the contrary, it confers upon him many benefits and privileges which the company is under no legal obligation to assist in providing. If the employee is sick or injured from any cause, with which the company is wholly disconnected, he may enter its hospitals and without expense be nursed back to health. When he is convalescent, but unfit to return to labor, he can draw a weekly allowance. There is an insurance feature by means of which the employee can provide for his family in case of death at a cost far less than that of ordinary insurance. In fact, the benefits to be derived from this association by its members

are very great and cannot be well measured by a present cash equivalent. That is the reason that scores of the members have appeared before successive legislative committees and protested against its destruction by legislative enactment.

My opinion is that when a member is injured in the service of the defendant, and claims that his injury is due to negligence for which the defendant is responsible, he should consider well whether he will take the emoluments and benefits which membership in this association confers and continues through a long course of years, or whether he will give up those and sue the company for damages and take the chances of litigation.

The courts should be careful to see that, when the employee makes this choice, he is in a mental and physical condition and his surroundings are such that he may make a deliberate and voluntary choice, free from any overruling influence. It should be the voluntary act of the employee and the choice made when he is in fit condition to make a free choice. When he does make such election, then according to all the authorities, the employee should be compelled to abide by it. I do not think that under such circumstances, if he decides to remain in the association and take what it offers and abide by its regulations, the courts can look any further into the matter to see if the employee has received enough compensation or has made a wise choice. Being a member of the association, the employee is familiar with its advantages and knows beforehand exactly what it offers him. He also knows the uncertain fruits to be derived from a lawsuit. Therefore I think the Court errs in considering the matter as an adjustment, or a settlement in any sense.

It is simply an election. There are two courses open to the injured employee. He may elect to take either, but he cannot take both. And when he deliberately decides in the full possession of his faculties, knowing well what he does, and free from undue restraint or influence, that should end the matter so far as the courts are concerned. This is not only the consensus of all the authorities, but it is, to my mind, entirely consistent with the principles of justice and fairness.

3. All the evidence shows that this plaintiff, after he was injured in the shops, decided to "abide in the ship" and take

the benefits offered by the relief department. He filed the application voluntarily and complied with the regulations and for some few weeks he received his allowance regularly. I find nothing in the record to indicate any wrong, undue influence or oppression practiced on plaintiff to influence his decision. But there is evidence that before he was recovered, the allowance and benefits were arbitrarily and abruptly terminated and stopped by Dr. Wessell, an assistant surgeon of the relief department of the defendant, and without any notice to plaintiff or opportunity to be heard.

I am not aware that there is anything in the articles of agreement which conferred upon Dr. Wessell the right to terminate the plaintiff's benefits in such manner.

In order that this may be considered and inquired into on another trial, I concur in the order of the Court granting a new trial.

MR. JUSTICE WALKER concurs in this opinion.

HOKE, J., concurring: In *Barden v. R. R.*, 152 N. C., 319, and several other cases, where a similar question was presented, it was contended for the company that a receipt of benefits, under the provisions of the relief department, by an employee who was a member, should operate as an absolute bar to any action, by said employee, to recover damages for injuries caused by the negligence or other wrong of the company. Being of the opinion that to allow the receipt of benefits the effect contended for would, in nearly every instance, be in direct violation of our statute law, Revisal, sec. 2446, I concurred in the decision declaring the provision void. The statute in question enacts, in substance, that any employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such employee who has, in the course of his employment, been killed by the negligence, carelessness, or incompetence of any other employee, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company, and then concludes with the provision, "That any contract or agreement, expressed or implied, made by any employee of the company to waive the benefit of this section shall be null and void." True, there are numerous decisions of the courts elsewhere that the receipt of benefits, under the provisions of this charter or scheme known as the relief department, shall operate as a bar to the action, basing their ruling, chiefly, on the position that the acceptance of benefits is in the nature of an adjustment after the injury; but, in my view, the position is untenable here, for the reason that to allow the receipt of benefits the effect of an absolute bar, resort must be had to the stipulations of the contract by which the injured employee became a member, and so comes directly within the prohibition of the statute referred to. While not directly presented, because the Court was upholding the provisions of the Federal statute as to companies engaged in interstate commerce avoiding a similar stipulation, this view was suggested in a recent case before the Supreme Court of the United States, *R. R. v. Maguire,* 219 U. S., at page 566, in which *Associate Justice Hughes,* delivering the opinion, said: "The acceptance of benefits is of course an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation, which the statute nullifies, is one made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction of all claims for damages," etc.

From the principle here suggested and on the view of this relief department and the acceptance of benefits under it which has been always heretofore presented, I am of opinion that the case of *Barden v. R. R., supra,* was properly decided and might be allowed to prevail now, as a correct and forcible statement of the law controlling the subject.

In the present cause, while disapproving *Barden's case* to the extent that it holds the provision in question absolutely void, the principal opinion by *Associate Justice Allen* now decides that the acceptance of benefits by an injured employee, having a right of action against the railroad company, whether regarded in the nature of a release or an accord and satisfaction, may be successfully assailed in the courts for fraud, undue influence, or oppression, and that, on such issue joined, the entire facts may be presented, including the circumstances under which the employee became a member, as well as those more directly attendant upon the transaction, and that, in some instances, this fraud may be inferred when there is such gross disproportion between the amount received and the extent and value of the claim as to make it clear that no fair adjustment has been had nor one that in equity and good conscience should be allowed to stand. From this opinion and two on the same subject and under differing facts, by the same learned judge, at the present term, *Nelson v. R. R.* and *Wacksmuth v. R. R.*, I am convinced that a wise and workable rule has been found and established by which the beneficent features of this department may be preserved and proper and adequate relief afforded to injured employees having meritorious claims, and therefore concur in the opinion as written.

JOHN A. YOUNG ET AL. v. SOUTHERN RAILWAY COMPANY.

(Filed 15 November, 1911.)

1. **Objections and Exceptions—Former Testimony—Harmless Error.**
   When objection is made to the admissibility of evidence theretofore testified by the witness, without objection, the error in admitting it, if any committed, is without prejudice to the objecting party, and harmless.

2. **Carriers of Goods — Delayed Delivery — Reasonable Time—Consignee's Readiness—Negligence—Evidence.**
   When, in an action by the shipper against the carrier for damages to a shipment of fruit trees to his sales agent, alleged to have been caused by the carrier's negligence in an unreasonable delay in transportation and delivery, the defense is relied on that the plaintiff's agent was not ready to receive them when they arrived, it is competent for the plaintiff to show, in explanation why his agent did not wait for their arrival and upon the measure of damages, that orders had been obtained for the trees by traveling agents upon a salary, and they had been sold for a certain aggregate sum to various parties to be delivered when they called for them at destination upon notice at a certain time; and, also, an order from one of plaintiff's customers requiring the trees to be delivered accordingly.

3. **Same—Instructions, Affirmative and Converse.**

An affirmative instruction on the facts in this case by the judge to the jury as to the duty of the consignee of goods in being ready to receive the consignment unreasonably delayed in transportation by the carrier, for which damages are sought, that if the plaintiff called for them within a reasonable time and made a reasonable effort to receive them if they reached there within a reasonable time, then he was not required to stay there until they came, unless he had some notice as to when they would arrive; that if he made a reasonable effort to get them, and they did not arrive within a reasonable time, and they were lost to him on that account, then he would be entitled to recover damages, but otherwise he would not be, is not objectionable for that the converse of the proposition was not charged, the words "but otherwise he would not be" being sufficient.

4. **Carriers of Goods — Negligence — Delayed Delivery—Consignee's Readiness—Issues, Relation of—Instructions.**

In an action for damages to a shipment of goods, alleging that they were caused by the failure of the carrier to transport them within a reasonable time, the first issue related to the reasonableness of the time of transportation, the second as to the injury caused thereby, and the third as to the amount of damages: *Held*, no error of the trial judge to instruct the jury in reference to the relations of the issues to each other, that if they answered the first issue "Yes," they should go to the next issue; and if they answered the second issue "Yes," they should find the damages under the third; and that if they should answer the first issue "No," they need not go further, but return their verdict.

5. **Carriers of Goods—Delayed Delivery—Measure of Damages—Instructions—Agreement of Counsel—Appeal and Error.**

In this action for damages alleged to have been caused by the negligence of defendant carrier in transporting a shipment of goods: *Held*, not error for the trial judge to omit to charge the jury upon the rule of the measure of damages, it appearing that the counsel for both parties had agreed on the trial, in the presence of the jury, and with the sanction of the court, that the damages should be the difference in value between the market price of the goods when delivered and the actual value of the damaged goods, should the defendant be held answerable.

APPEAL from *O. H. Allen, J.*, at August Term, 1911, of GUILFORD.

This is an action to recover damages for loss and injury to certain fruit trees and nursery stock, shipped over the line of the defendant and of connecting carriers. There were two shipments, one to Williamsburg, Va., and the other to Tappahannock, Va.

On 23 October, 1907, the plaintiffs delivered to the defendant three boxes of trees and other nursery stock, consigned to John A. Young's agent, to be shipped by freight to Williamsburg, Va., a station on the Chesapeake and Ohio Railway about fifty miles east of Richmond. The plaintiff did not pay the freight charges for transportation, but guaranteed it. The trees arrived at Williamsburg on 6 November, fourteen days after the date of the bill of lading. The plaintiff's agent having called for the trees at the station of the Chesapeake and Ohio Railway in Williamsburg on the 1st, 2d, 3d, 4th, and 5th of November, refused the shipment on the ground that they had been too long en route and were damaged.

Freight delivered at Greensboro to the Southern Railway Company for shipment to Williamsburg, Va., goes via Danville and Richmond over the Southern Railway Company; at Richmond it is transferred to the Chesapeake and Ohio Railway and goes over that road to Williamsburg. There is a car of freight from Greensboro to Richmond each day, but if freight is delivered at the station at Greensboro too late to take that train, it remains until the next day before it is forwarded. Danville is an intermediate point between Greensboro and Richmond, and freight for Williamsburg would have to be transferred at Danville; it would also have to be transferred at Richmond from the Southern Railway Company to the Chesapeake and Ohio.

The plaintiff had sold these trees for $908.08, and sued for that amount.

On 25 October, plaintiffs delivered to the defendant certain fruit trees and nursery stock consigned to John A. Young's agent for shipment by freight over its own and connecting lines to Tappahannock, Va., a town on the Rappahannock River, not on a railroad line. The trees arrived at Tappahannock on 12 November, eighteen days after the date of the bill of lading.

The plaintiff's agent called for them and accepted them, but found they were damaged so that about one-fourth were unfit for delivery. Plaintiff had sold the whole shipment for $287.17 and sued for $108.15 as the amount of his loss on account of the damaged trees. Freight from Greensboro for Tappahannock goes over the Southern Railway via Danville to Richmond; there it is transferred to the Richmond, Fredericksburg and Potomac Railroad, and is carried over that road to Fredericksburg; from there to Tappahannock the freight is carried by boat, which runs twice a week.

In making each of said shipments, the plaintiffs, in order to secure prompt service and delivery of the said freight so delivered to the defendant for shipment, paid to the defendant a higher rate of freight than it was necessary to pay if the plaintiffs had been willing to contract for the delivery of the freight to the defendant railway company marked "Released." By reason of the delay on the part of the defendants in the Tappahannock shipment, plaintiffs were put to an additional expense in delivering the goods of $108.52.

The shipment to Williamsburg was never delivered to the plaintiff, although the agents waited for it at Williamsburg until 5 November, at which time the defendant's agents would not advise them when the trees would arrive and they had no reason to expect that they would arrive on any certain subsequent date. The plaintiff having other engagements to meet other shipments in that territory, left Williamsburg on 5 November. When the trees did arrive, they were of no value whatsoever to the plaintiff, who was forced to fill his orders at Williamsburg by an extra order sent by express.

Freight shipped from Greensboro to Williamsburg was routed to Richmond, Va., one hundred and eighty or ninety (180-190) miles from Greensboro. A through car of freight from Greensboro to Richmond is made up each day, and freight loaded one day in Greensboro ought to reach Richmond the evening of the next day. The railroad company required the plaintiff to guarantee the payment of the freight on each of these shipments.

The following verdict was returned by the jury:

1. Did the defendant fail to transport the property of the plaintiff from Greensboro to Williamsburg, Va., within a reasonable time? Answer: Yes.

2. Was the property of the plaintiff injured by reason of said failure of the defendant to transport within a reasonable time? Answer: Yes.

3. What damage, if any, has plaintiff sustained? Answer: $908.08, without interest.

4. Did the defendant fail to transport the property of the plaintiff from Greensboro to Tappahannock, Va., within a reasonable time? Answer: Yes.

5. Was the property of the plaintiff injured by reason of the failure of the defendant to transport said property within a reasonable time? Answer: Yes.

6. What damages, if any, has plaintiff sustained? Answer: $108.02, without interest.

Judgment was rendered thereon, and the defendant excepted and appealed.

Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

Allen, J. There are fourteen assignments of error, six of which relate to the rulings on the evidence, and of these, with possibly one exception, the same witness had, before the exception was taken, testified to the fact admitted or excluded, and therefore, if error was committed, which we do not find to be so, the defendant was not prejudiced thereby.

The assignment of error, which may be an exception, is to a part of the evidence of one of the plaintiffs, John A. Young. He testified, among other things, in reference to the Williamsburg shipment: That he had orders from customers for both shipments; that the orders were obtained by traveling men on salary, with their expenses paid; that W. J. Thompson had interest in the money collected in both cases; that the goods shipped to Williamsburg had been sold for $908.08; that the interest would run from 2 November, 1907; that none of the Williamsburg shipment was delivered, and that he had a conversation with Mr. Devlin, the agent of the defendant, about the shipment to Williamsburg, and told him that it had not arrived and asked him to look it up and that if he did not get it promptly in good condition that he would refuse the shipment, and he replied that he would have it looked up at once; that that was on the 2d or 3d day of November, 1907; and was then asked the following question:

Q. What date were your customers to be there to receive these goods? A. At Williamsburg on 2 November.

We think this evidence was competent to meet one of the contentions of the defendant, that the plaintiffs were negligent in not being ready to receive the trees at Williamsburg, and particularly so as it introduced one of the orders for trees of a customer of the plaintiffs requiring the trees to be delivered at Williamsburg in October, November, or December, 1907, and notice to be given by mail of date of delivery.

The defendant also excepted to the following portions of the charge:

1. If the plaintiff called for them, called for them within a reasonable time and made a reasonable effort to receive them if they reached there within a reasonable time, then he was not required to stay there until they did come, unless he had some notice as to when they would arrive; but if he made a reasonable effort to get them, and they did not arrive within a reasonable time, and they were lost to him on that account, then he would be entitled to recover damages, but otherwise he would not be.

2. So if you answer the first issue and the fourth issue—that is, the issue as to the reasonable time—if you answer that "Yes," you will go to the next issue, "Was the property of the plaintiff injured by reason of said failure of the defendant to transport within a reasonable time?" And if you answer that "Yes," you will go to the last issue and answer, "What damages, if any, has the plaintiff sustained?" If you answer the first issue "No," you need not go any further, but return your verdict; and the same rule applies to the fourth, fifth, and sixth issues—that is, as to the Tappahannock shipment.

The criticism of the first part of the charge set out, as shown in the brief of the appellant, is "that his Honor should have charged the jury that even if the goods did not arrive within a reasonable time, it was the duty of the plaintiff to remain at Williamsburg a reasonable length of time, or to have made arrangements with some other person to receive and examine the goods when they did arrive, in order to mitigate, if possible, the damages. He should have further given to the jury the converse of the proposition, and stated that if the plaintiff did not call for the goods within a reasonable time and did not make a reasonable effort to receive them if they had reached there within a reasonable time, he would not be entitled to recover damages."

We think the converse of the affirmative charge was given in the language, "but otherwise he would not be," which can only mean that if the plaintiff did not call for the trees within a reasonable time and did not make a reasonable effort to receive them, the defendant would not be liable; and the charge also presents the view of the defendant, that it was the duty of the plaintiff to use reasonable effort to receive the trees.

We can see no possible objection to the other portion of the charge. It is no more than an explanation to the jury of the relation of the issues to each other.

The remaining assignments are to the failure to state to the jury any rule as to the measure of damages, and this would be fatal and would entitle the defendant to a new trial if it did not appear from the record that there was no controversy between the parties as to the true rule, and that they agreed in the presence of the jury, and with the sanction of the court, as to what it was.

The record states that during the trial, in the presence of the jury, when the plaintiff was offering evidence as to damages, the counsel for the defendant objected to the evidence and stated the rule as to damages to be the difference in value between the price at which the goods were sold, or rather the market price of the goods when delivered to defendant, and the actual value at the time they were alleged by plaintiff to have been damaged by the negligence of the defendant. The court stated that it so understood the rule as to damages, and thereupon the counsel for the plaintiff said he would agree that that was the rule, and the court said, "Let that be understood," and the argument was conducted accordingly.

The jury could not have been misled when the agreement was made before them and the court said, "Let that be understood as the rule of damages."

Upon an examination of the record, we find

No error.

R. H. TROLLINGER v. F. H. FLEER.

(Filed 15 November, 1911.)

1. **Instructions, More Explicit—Special Requests—Practice.**

   When the judge properly instructs the jury generally upon the law applicable to the issues, an exception that the charge was not full or explicit will not be considered on appeal, as, in such a case, error can only be assigned to the refusal of the judge to give proper and more explicit instructions in response to special prayers therefor.

2. **Contracts—Agreeing Mind—Requisites.**

   While it is necessary to a valid contract that the parties assent to the same thing in the same sense, the assent may be given by the agent of a party having either express or implied authority to do so.

3. **Contracts—Principal and Agent—Confirmation—Subsequent Ratification—Authority Express or Implied.**

   When one person holds another out as his agent and thereby induces others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so; or, if he ratifies what he did, it is the same, in effect, as if he had in the beginning actually and expressly conferred the requisite authority.

4. **Same—General Charge—Evidence—Questions for Jury.**

   The defendant, having made by letter a definite proposition to the plaintiff to work on his farm, requested an acceptance of the proposition by telegram, with which the plaintiff complied. The plaintiff then went to the defendant's farm, and his employment was accepted in accordance with the terms of the proposition by one who was in possession, assuming full control and management for the defendant; and there was evidence of ratification by the defendant at a subsequent time when he visited his farm: *Held*, (1) the question of plaintiff's employment under the contract did not depend solely upon whether the defendant received the telegraphic reply to his written proposition, but also upon whether it was consummated by the acts of the defendant's agent; (2) the recognition by the defendant of this agency, with full knowledge of the facts, was a ratification of the agent's prior acts, and his assent to what the agent had done was equivalent to prior authority given; (3) evidence that the defendant placed the agent in general charge of his farm, with apparent right to make contracts of employment, is competent to be considered by the jury upon the question whether an agency of the character claimed existed or not.

APPEAL from *Lyon, J.*, at March Term, 1911, of DAVIDSON.

This action was brought by the plaintiff for loss of wages for himself and his two sons for twelve months, alleging that he made a contract to work for the defendant on his farm near Thomasville for one year from 1 July, 1909, at the price of $1,200 and $1 per day for each of plaintiff's sons, said payments to be made monthly, and also for expenses of moving his furniture to the defendant's farm, and for loss incurred in giving up his position, which he claimed he filled, with some other parties.

The defendant denied that he had ever hired either the plaintiff or his sons, and alleged that the proposal to hire them was altogether tentative, and was dependent upon his interview with the plaintiff at the defendant's farm, as appears in the last clause in defendant's letter to plaintiff, dated 22 June, 1909, in which he says: "I will look for an immediate reply, after receiving which I will make it convenient to meet you at an early date." The defendant further alleges that the plaintiff had made certain representations as to his qualifications to do the work required with machinery, which he ascertained were not true, as he could not operate the machinery with which the defendant expected to farm. The defendant further denied that he had made any contract for the hire of the boys, but the court treated the hiring of the plaintiff and the two sons as an entire contract. The plaintiff and his sons were discharged by the defendant and, they allege, without just cause or excuse. The defendant contended at the trial that there was no sufficient contract of hiring between the plaintiff and himself, and that his brother, M. L. Fleer, who actually hired the plaintiff and his boys upon the terms mentioned, had no authority from him to do so. This requires a summary of the testimony.

On 7 June, 1909, plaintiff mailed to the defendant, from Seneca, S. C., a letter, in which he proposed to hire himself as manager, and his boys as laborers, to the defendant, who owned and cultivated a farm in Davidson County, making a formal application for the positions. Defendant answered, 16 June, 1909, as follows: "I believe you would be the man for the job, and if you will tell me what pay you expect I am willing to take the matter into consideration. Figure upon straight wages by the month or year, as I do not care to share crops. Your reply should be sent to my Philadelphia office to reach me promptly. Use the inclosed envelope." To this letter plaintiff replied, proposing to hire himself, as manager, at $1,200 a year, and each of his boys at the wages of "a common day laborer." Defendant acknowledged the receipt of this letter 22 June, 1909, in a letter of that date, and then proceeded as follows: "I am very favorably impressed with the statement you make regarding your ability, and I have no doubt that if I were to engage you we could get along nicely. The only house I have in which it would be practicable for you to live, in order to have the place under supervision, is the tenant-house now occupied by a colored man. This only has four rooms, but could be enlarged by a second story, whereby it would be large enough to accommodate you. I should like to send the present tenant of this house away not later than 1 July, if you could be ready to move in by that time with only part of your family. I would then immediately start to erect an addition large enough to accommodate you all. It would require one or two of your boys to take care of the work around the barn and place, and they should come along with you at once. The wages for common farm labor around our parts is $1 per day, and your boys will have to start at that price. If you, yourself, could start in on 1 July, I should like to have an immediate answer by telegraph, in order to give the colored man now in the tenant-house a chance to look for work elsewhere, and make other necessary arrangements." In answer to this letter, plaintiff wired defendant, 28 June, as follows: "Will start to work 1 July, with one boy. Will be here to-day."

Plaintiff testified that on 30 June, 1909, he went to the farm with one of his sons, for the purpose of making preparations to move into the house with his family and to do the work assigned to them. He found there M. L. Fleer, defendant's brother, who had entire charge and control of the farm, defendant being absent and at his home in Philadelphia, Pa. That M. L. Fleer directed the work on the farm, kept the time of the employees and paid them their wages, issued checks for F. H. Fleer. He then stated that M. L. Fleer told him "to move into the house," and also put him and his son to work. When he first met M. L. Fleer at the farm, he said to plaintiff: "This is Mr. Trollinger, is it?" To which the plaintiff replied, "Yes." He then said: "I was looking for you; had a letter from brother that you would be here to-morrow to go to work; and where are the boys?" To which witness replied that he had not agreed to bring but one, and he was with him. M. L. Fleer also told him that he had the house cleaned up ready for him to move into, but he was to have two boys. Witness told him he would furnish the other one later; that he had wired to the defendant that he would bring one, and he had him with him. Plaintiff testified further as follows: He had worked nine days and was taken sick and had to go to bed, but before he went to bed the defendant came, but he had no conversation with him except with regard to work; talked to him frequently about the work; was working just as a hand with the rest; the defendant was on the farm only two days; the second day he was there plaintiff went over to see him, and spoke to him, and the defendant said, "I am afraid I have made a mistake and hired a sick man," to which the plaintiff replied, "Yes, I am sick; I guess I will get well or die off your hands." That the defendant then excused himself, and he has never spoken to him since. He left for Philadelphia that night.

There was evidence tending to contradict the plaintiff's proof as to the authority of M. L. Fleer to make the contract, and as to what the defendant had said to the plaintiff when he was sick;

the general trend of the evidence, on the part of the defendant, being to show that no contract was made unless by the letters which passed between the parties; and there was also evidence, on the part of the plaintiff, tending to show that he and his boys had complied with the contract to the date of their discharge, and that the discharge was wrongful, and evidence on the part of the defendant to the contrary.

The judge substantially charged the jury to find whether the contract of hiring was entered into by the parties, as alleged by the plaintiff, and that if the plaintiff and his boys, after the telegram of 28 June was sent to the defendant, went to the farm and were put to work by M. L. Fleer, and he was the agent of the defendant for that purpose, the plaintiffs would be entitled to recover the contract price, less what he and his sons had since received for their services elsewhere, unless the jury should find that they were rightfully discharged, the burden to prove that fact being upon the defendant; and if the jury found that there was no contract, or if there was one and the plaintiff and his sons were rightfully discharged for a breach thereof, their verdict should be for the defendant. There was a verdict for the plaintiff and judgment thereon. Defendant appealed.

T. J. Jerome and E. E. Raper for plaintiff.

A. F. Sams, F. C. Robbins, and Watson, Buxton & Watson for defendant.

WALKER, J., after stating the case: There was ample evidence to show that a contract for the hire of plaintiff and his sons had been made by the defendant, and we think the case was fairly submitted to the jury, with proper instructions as to the law. The motion to nonsuit, and the prayer for peremptory instructions, were, therefore, properly overruled. The charge may not have been as full or as explicit as defendant may have desired it to be; but, if not so, they should have asked for special instructions, so that it might be made so. *McKinnon v. Morrison,* 104 N. C., 354; *Simmons v. Davenport,* 140 N. C., 407; *S. v. Yellowday,* 152 N. C., 793. We have no doubt that the learned judge would promptly have complied with any such request.

We need not decide the case by an answer to the question whether the letters constituted a definite offer and the filing of plaintiff's telegram an acceptance thereof, as of the date of such filing, without regard to the fact, if true, as defendant testified, that he did not receive the telegram before he left Philadelphia, or to any loss or delay in transmission, or to any other casualty which prevented a receipt of plaintiff's notice of acceptance. This subject is fully discussed in Clark on Contracts (2 Ed.), pp. 25-27; 1 Wharton on Contracts, sec. 18; 1 Parsons on Contracts (9 Ed.), star pages 475-485, all citing and commenting upon the celebrated case of *Dunlop v. Higgins*, 1 H. L. Cases, 381.

There is, of course, no contract unless the parties assent to the same thing in the same sense; but it is not necessary that the assent should be given by the party himself, as it may be given by his agent, and it was in this way that the case was submitted to the jury. The real question then is, Was there evidence in the case that M. L. Fleer was the agent of the defendant to make the contract? and this agency could be established by express authority given to him or by the conduct of the defendant in holding him out as his agent for that purpose. He was certainly willing to contract with the plaintiff upon the terms stated in the letter of 21 and 22 June. The evidence tends to show that he had left M. L. Fleer in full charge of his farm, with apparent authority to act for him in the premises, and there was also evidence that he afterwards recognized him as his agent by ratifying what he had done and with knowledge of the facts. "Where a person, by words or conduct, represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency, as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." Tiffany on Agency, p. 34. This has been called an agency by estoppel, but whether the defendant was estopped or not, the fact of the defendant's having put M. L. Fleer in general charge of his business, with the apparent right to make contracts of employment, is competent to be considered by the jury, upon the question whether an agency existed or not. The rule is thus stated in Reinhardt on Agency, secs. 89a to 92, especially in section 91: "The doctrine of estoppel as applying to agency may, therefore, be summarized that where a party holds out another as his agent, or has knowingly allowed such person to act for him in one or more similar transactions without objection, he will, as a general rule, be estopped to deny the agency, whether it in fact existed or not, if a third party, without knowing the real state of the matter, and acting in good faith, and as a reasonable man would act from the appearance of things as created by the supposed principal, relies upon the existence of the agency and deals with the supposed agent as such, if the transaction be within the real or apparent scope of the authority exercised." But, "It is not necessary, however, that the principal's assent or sanction be given in advance of the performance of the transaction which constitutes the subject-matter or purpose of the agency. If his assent be obtained after the transaction by a confirmation of the assumed relation, it is equally binding and efficacious. Such a confirmation of the authority of the supposed agent is called a ratification." Reinhardt on Agency, sec. 96. This assent is equivalent to prior authority. "The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but without authority or in excess of authority, with the same force and effect as if the relation had been created by appointment." Tiffany on Agency, p. 46. There were facts and circumstances which the jury might well have found from the evidence to exist, and which would reasonably induce a careful and prudent person to suppose that M. L. Fleer was clothed with sufficient authority to make the contract of hiring; and certainly there was ample evidence to support a finding that the defendant had ratified his acts. There was a direct conflict between the plaintiff and the defendant in their testimony upon this question, but it was for the jury to pass upon the evidence and to find the truth of the matter. If defendant held his brother out as his agent and thereby induced others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so; or if he ratified what he did, it is the same as if he had actually and expressly conferred the requisite authority. In either case, he is bound. *Bank v. Hay,* 143 N. C., 326.

This covers all the exceptions to evidence, refusal to nonsuit, refusal to instruct as requested, and to the charge as given. It is to be noted that the exceptions to the charge were taken to instructions which had already been given without exception—in other words, to the repetition of those instructions. But waiving that defect, we place our decision upon another ground. The question was really one of fact, which the jury have found against the defendant. They believed the plaintiff's version.

A careful review of the case leads us to the conclusion that the learned judge committed no error at the trial.

No error.

J. E. PRITCHETT v. SOUTHERN RAILWAY COMPANY.

(Filed 15 November, 1911.)

1. **Master and Servant—Negligence—Safe Place to Work—Duty of Master—Negligence—Evidence.**

When in an action for damages for a personal injury received by an employee while at work in a machine shop, there is evidence tending to show that a brass chip from a boring mill struck him in the eye and caused the injury complained of, which would not have occurred if a screen, known and in general use, had been furnished and properly placed, evidence is competent to show from the condition of an air hammer with which the plaintiff was at work at the time, and from the fact that plaintiff was not then striking with it, that the injury could not have been caused by a chip flying on account of his own negligent use of the hammer, the defendant contending that the injury was caused by a chip from the air hammer.

2. **Same—Immediate Injury—Contributory Negligence.**

Upon conflicting evidence as to whether the plaintiff, an employee, was negligently injured in defendant's machine shop, by a brass chip flying from a boring mill being operated near where he was working, without protecting him with a shield customarily used for the purpose, it is competent for the plaintiff to show, upon the question of his contributory negligence, that the boring mill was not in operation when he commenced to work, that the chip entered his eye almost instantly, and that he would have completed his work there within one and one and a half minutes, as relevant upon the question as to whether he should have taken greater precautions for his safety if he had been required to stay there longer in the position he necessarily assumed.

3. **Master and Servant—Contributory Negligence—Declarations of Master—Haste—Unaccustomed Work—Evidence.**

The plaintiff was an employee of the defendant in its machine shop, and there was evidence tending to show that he was injured in the eye by a flying brass chip from a boring mill operated near, without the customary guard for his protection, just after he had been ordered there by defendant's foreman: *Held*, evidence is competent, on the question of contributory negligence, tending to show that the defendant's foreman told the plaintiff shortly prior to the injury that they were behind on that particular piece of work and he wanted him to assist on the job in the place of the regular man, who was sick.

4. **Master and Servant—Safe Place to Work—Flying Chips—Screen—Negligence—Evidence.**

The plaintiff was injured in the eye while working in defendant's machine shop, and there was evidence tending to show that it was received by a flying brass chip from a boring mill, operated near the place where he was at work, which would not have occurred had the borer been guarded by a shield customary and in general use: *Held*, evidence is competent that this machine had theretofore thrown chips in the place where plaintiff was working when injured, under similar conditions, for the purpose of fixing the defendant with notice of the danger.

5. **Master and Servant—Safe Place to Work—Negligence—Former Conditions—Notice Implied—Ordinary Care—Evidence.**

The burden of proof is on the plaintiff to show that the place furnished him by the employer to work in was unsafe, when for that reason he seeks to recover damages for an injury therein inflicted, and that the defendant knew it to be so, or that it could have discovered it by the exercise of ordinary care; and evidence that the condition complained of had previously existed for a long period of time is evidence of defendant's knowledge.

6. **Instructions — Requisites of Requests — Signed by Counsel—No Reason for Refusal—Record—Appeal and Error.**

Requests for special instruction must be written and signed by the attorney for the parties requesting them, and handed to the presiding judge before the commencement of the arguments to the jury, unless, in his discretion, the trial judge has granted an extension of time; and when it appears that this has not been done, it is not necessary for the record to show the reason of the trial judge in not giving them, and an exception upon that ground will not be considered on appeal.

7. **Master and Servant—Safe Place to Work—Negligence—Causal Connection—Burden of Proof.**

An employee must show, in his action for damages for personal injury alleged to have been negligently caused by the master's not furnishing him a safe place to work, that the negligence complained of was the real and proximate cause of the injury, and not merely that he was working at an unsafe place on the premises at the time.

8. **Master and Servant—Dangerous Machinery—Higher Degree of Care—Duty of Master.**

The employer is held to a higher degree of care in providing for the safety of an employee whose services are rendered as a mechanic in a shop containing intricate and dangerous machines, than formerly when the tools were simpler and the mechanic more familiar with their qualities and the dangers incident to their use.

9. **Negligence—Definition—Changing Conditions—Care Required.**

Negligence is the failure to perform a duty imposed by law to exercise that care which a man of ordinary prudence would have exercised under existing circumstances, and when conditions change the degree of care required changes with them.

10. **Master and Servant—Safe Place to Work—Machine Shop—Flying Chips of Metal—Guard—Negligence—Evidence.**

In an action to recover damages for a personal injury to the plaintiff's eye, there was evidence that the injury occurred on the day of his employment in a machine shop with complicated machinery in motion; that the place of his employment was new to him, and that the injury was caused by a brass chip flying from a boring mill located near, which started in operation after he had begun a piece of work requiring him to face the boring mill in its performance, and which was without a guard in general use, which would have arrested the chip and avoided the injury, if properly placed; that owing to the character of the wound, the injury was caused by a chip from the boring mill, which was throwing the chips around the place where plaintiff was necessarily at work, and not from the machine plaintiff was operating at the time: *Held*, sufficient evidence of defendant's negligence as the proximate cause of the injury, on a motion to nonsuit.

11. **Master and Servant—Duty of Master—Delegated Duty—Contributory Negligence—Assumption of Risks.**

In an action for damages brought against the employer for failure to provide for the plaintiff, an employee, a safe place to work, it is proper for the jury to consider the knowledge or familiarity of the employee with the conditions and surrounding circumstances of his work, on the issue of contributory negligence; and as it is an absolute duty the employer owes to provide for his employee a safe place to work, which he cannot delegate, and as the employee accepts only such risks as are ordinary to the employment, the doctrine of assumption of risks has no application.

APPEAL from *Lyon, J.*, at May Term, 1911, of ROWAN.

This action is to recover damages for the loss of an eye and other injuries caused, as the plaintiff alleges, by the negligence of the defendant in failing to furnish him a safe place to work, and in not providing a shield to protect him from brass chips falling from a boring mill.

The defendant denies negligence and alleges that the injury to the plaintiff was an accident, or that it was caused by his contributory negligence, or was the result of one of those risks assumed as a part of his employment.

All of the evidence is not set out, but enough to consider the motion of the defendant for judgment of nonsuit.

J. E. Pritchett, the plaintiff, testified: "I am the plaintiff. I am 31 years old. Am a machinist."

Here the defendant admitted that the plaintiff was in its employment as a machinist in its machine shops at Spencer, North Carolina, at the time he was injured.

"I have served my apprenticeship and have been working at my trade as machinist for fifteen or sixteen years. I was employed by the Southern Railway Company in its machine shop at Spencer, beginning work on 20 June, 1910. I reported for work, and my first work was on the rod job on the eastern side of the shops. After I had been at work on the rod job three-quarters of an hour that afternoon, Mr. Daniels, defendant's shop foreman, came and told me that they were behind on the driving-box job, and that he wanted me to assist in the driving-box job in the place of the regular man, who was sick.

Shop Foreman Daniels took me over there to the driving-box space, and introduced me to Foreman Hege, who was in charge of the driving-box shop that afternoon. Foreman Hege then laid off some oil grooves with chalk on some driving boxes in this driving-box space, for me to chip. I then went to work on those oil grooves, when I was instantly struck blind by something striking me in the eye. I had no warning of where it came from. Mr. Carver then took me in his arms. I could not see him, but I recognized him by his voice. Quite a number of men gathered round me, as I could tell by their voices. I do not know who pulled the brass out of my eye, but I am told that Foreman Daniels did it. This driving-box job space is 10 x 15 feet, and is located northwest of the rod-job space where I had been working. That driving box they put me to work on weighed from 500 to 700 pounds. Those driving boxes had been placed in that driving-box space before I got to that space. I did not help place them. I had chipped grooves on two or three of those driving boxes before I was hurt. The driving-box on which I was ordered to work was about 10 or 12 feet from a boring mill. At the time of my injury I was about 10 or 12 feet in a northerly direction from that boring mill. I was facing towards the boring mill, with my right eye exposed to said boring mill. I had never worked in this driving-box space before. The boring mill was not in operation, but was idle, when I was carried there. The last time I noticed that boring mill was possibly a minute or a couple of minutes before I was hurt; and it was then idle. It was not running. When struck I was in a stooping position, the driving box in front of me. I had my air hammer in my right hand and my left hand over the barrel of it. At the moment I was struck, as well as my recollection serves me, I was trying to get control of this air throttle on the hammer. It was very stiff and would not work. When I first took hold of this hammer, I called Mr. Hege's attention to it, stating to him about the spring being very stiff. He said that spring is too rigid and stiff, and the way we control it is we have to put our finger on it and push it and work with the right hand. My best recollection is that at the time I was struck I had cramped my finger trying to get control of the hammer."

The defendant objected to the witness testifying as to the defective condition of the air hammer, on the ground that there was no allegation in the complaint of any defect in the air hammer. The objection was overruled, and the defendant excepted.

"When I was first struck by the chip, it was like a man being shot. It dazed me; but I threw my hands up immediately to my eye to hold it apart, as it burned like fire. The brass chip went in the center of my eye, or very close to the center of it.

"I was facing the direction of the boring mill with my right eye exposed. It became necessary for a man to be standing like I was. Certainly a man could twist, wrestle, and pull one of those driving boxes around, and his back would be towards the boring mill, if he desired to do so. I could not have got help to move that driving box, as help was scarce."

C. S. Carver testified as follows: "I am a machinist. Have been a machinist twelve years. I was working for defendant at Spencer the day Pritchett was hurt. I had been keying up some brass. I was 35 or 40 feet from Pritchett. This boring mill was on a line with him and me, and I could see both Pritchett and the boring mill at the same time. I was watching Pritchett at the time he was hurt and was the first man to get to him. I was watching him at the moment he was hurt. At that moment he was sitting down looking at his hammer. There was no chisel in it. I looked at him to see what he was doing. He was looking at his hammer. He had his throttle in his right hand and end of barrel in his left hand. No chisel was in his hammer at the time he threw his hand to right eye. Pritchett was facing the boring mill in a northeast direction with his right eye more exposed to the boring mill. Up to one minute before he was injured, the boring mill was not in operation. I saw defendant's apprentice boy, Kizziah, walk up to the boring mill and start it. I do not think the boring mill made more than two or three revolutions before Pritchett was hurt. That boring mill makes about 50 or 60 revolutions per minute. Pritchett was injured possibly 30 seconds after Kizziah started the boring mill. A piece of brass entered his eye near the center, and was taken out by Daniels about two minutes thereafter. I got to him in several seconds after he was hurt, as soon as I could run to him. He was holding his right eye open with his hands, and said he was blind. The boring mill was still in operation when I got to where Pritchett was hurt and the cuttings still flying. They will fly 120 degrees in a circular bed. Most of them go to the northwest. At the time I went to catch Pritchett those cuttings were flying so that they could hit me. There was no shield between his driving-box space and that boring mill. Pritchett was facing towards the boring mill when hurt. When the brass cutting hit him he dropped his hammer and staggered back. When I got to Pritchett the boy had not shut off the boring mill, and the cuttings were still flying to him. That shield protects the driving-box space to some extent, but not enough to where he was standing. It does not protect where he was standing, but the other side. I worked in the machine shops at Rocky Mount, N. C., Waycross, Ga., two machine shops on the C. and O., Richmond, Va., and Huntington, W. Va., and American Locomotive Works, where boring mills are used like defendant's at Spencer; and I have been through and observed ten or fifteen more shops where boring mills are used. Some shops have sheet-iron shields, some have bags, but in those shops canvas shields are mostly in general use as a precaution to protect the employees from brass cuttings that fly from such boring mills. It was the custom for those shields to be placed between the operator, wherever the operator might be at work, and the boring mill. Some have two shields, some are V-shape to come around the mill. Those safety shields that were in general use around machine shops of such kind were 6 or 8 feet square, on racks, with canvas backs tacked around them. Such a shield costs $2. If one of these shields had been placed between that boring mill and the driving-box space, it would have provided protection and safety to employees working within the zone of the cuttings that flew from that boring mill. Such a shield would not have interfered with the efficiency of any of defendant's machinery or hindered any of its employees. Defendant worked men in that driving-box space every day, and kept a man operating the boring mill pretty much all the time. Plaintiff's eye just after it was struck looked like it had been burned. That cutting was hot when it went in and his eye turned white. The kind of cuttings from the boring mill depend upon how the tools are ground, how much feed you have, how much cutting you have, and upon how deep the cuttings are you are taking. Cuttings from boring mill are hot. Cuttings from air hammer are cold on account of lack of friction. There was no shield between the driving-box space and that boring mill when Pritchett was hurt. In these machine shops it is customary to shield these boring mills with canvas shields. That is the proper kind of shield and answers the purpose. Yes, if defendant had had that kind of shield there the day Pritchett was hurt, and had had it large enough to come around the boring mill, it would have been the proper kind. Apparently plaintiff was looking down at the moment he was hurt. I could not see his eyeball."

J. B. Donovant testified as follows: "Am a machinist at Spencer. I was working for Southern Railway Company in June, 1910, about 25 or 30 feet from where plaintiff was when he was injured. I did not see him at the time he was injured. Have operated this boring mill something like three and a half years. Cannot tell whether the boring mill is in the same condition now as it was then. I saw that boring mill during June, 1910. There has been no change in that mill that I know of since I worked it. It is the same mill. When I worked it, it would throw brass, I would say, a little over a quarter of a circle of the machine. That is, you would get 10 feet from the machine and they would go 10 feet. At the time I operated it, it would throw shavings in the same portion of the driving-box space where plaintiff was working. It is the general custom for the men to move around the boring mill in chipping it."

W. P. Neister testified as follows: I have been working as a machinist for defendant at Spencer nine or ten years. To my personal knowledge, that boring mill is located now where it has been for three or four years; so has also the driving-box space been located in the same place for the past four years. I do not remember any alterations prior to time Pritchett was hurt. I worked 30 or 40 feet from that boring mill. I have observed it. Every few minutes I was looking in that direction and often passed there. It was the same boring mill three or four years ago, as far as I know, without any change. During that time I have seen it throwing off brass cuttings, before Pritchett was hurt. It would throw the biggest majority of the brass shavings in a northwesterly direction, but they did not all go in that direction. The rest would go north and possibly to the northeast, slightly. I did not see the driving box Pritchett was working on when hurt, to recognize it; but I have been pointed out the place and I know where the driving box was when he was hurt, and I have heard witnesses to-day describe where he was; and from where the witnesses say Pritchett was at the time he was injured, he was in the zone of those flying shavings at the time he was hurt, according to my knowledge and honest belief. There was no shield between this driving-box space and the boring mill the day Pritchett was hurt. It was customary for defendant to work employees throughout the day in this driving-box job space. I operated the boring mill in March or April, 1910. At that time, using the same right-hand head, it scattered cuttings quite a good bit in the space where Pritchett occupied, in the lower end of the driving-box space."

I. N. Ayers testified as follows: "I have been a machinist for thirteen years. Was working for defendant in June, 1910, when plaintiff was hurt. I was 25 or 30 feet from where plaintiff was working. I have seen that boring mill throw brass before Pritchett was hurt. I had been working there twelve months before Pritchett was hurt. The boring mill would throw brass about a quarter circle of the boring mill. I think the boring mill would throw brass clippings where Pritchett was. During those twelve months Foreman Daniels would pass that driving-box space about fifty times a day while that boring mill was in operation."

J. F. Perkinson testified as follows: "I am working for defendant, and I was working for it as a machinist at Spencer in June, 1910, and about 30 feet from where plaintiff was hurt. Did not see plaintiff when he was hurt. I had been working in those shops about ten months prior to the time plaintiff was hurt. During that time I had seen that boring mill in operation every day. The tool has something to do with where the cuttings are thrown from that boring mill. You can place a tool so that it will throw them in almost any direction. If you are using the head spoken of this morning, the biggest portion of the cuttings would go in a northwesterly direction. This boring mill would usually throw part of its brass cuttings to where Pritchett was when he was hurt. I do not know that there was a screen out there. I did not see one that day. A screen in the northwest direction would catch part of those shavings, but not all. They will fly in every direction. The biggest portion of them will go in a northwest direction; but you cannot tell where the other shavings are going to fly. They scatter in every direction."

C. S. Flood testified as follows: "I am a machinist. I was working for defendant at Spencer last June, about 30 feet from where plaintiff was when he was hurt. Before Pritchett was hurt I worked in the driving-box space where plaintiff was hurt. When I worked in that driving-box space a couple of days before Pritchett was injured, they had a tool on the boring mill exactly like the one and shaped like the one they were using when Pritchett was hurt; and it then threw cuttings to the place where Pritchett was hurt. I have had experience in five or six machine shops of this kind where boring mills are generally used: American Locomotive Works, Pennsylvania Railway at Baltimore, S. A. L. at Waycross, Ga., A. C. L. at Rocky Mount, N. C., at Pittsburg, etc., and have had observations in others. The general custom of all machine shops is to have this canvas screen to protect the boring mills to keep the cuttings off of the men. I did not see such screen there the day Pritchett was hurt. The cuttings from the boring mill were hot because of the friction. The hammer would throw cold cuttings. Pritchett's eye was all inflamed and looked like a white blister hanging on his eye."

The defendant offered evidence tending to establish the following facts:

(1) That the danger from chips was northwest from the boring mill, and that it had a shield there.

(2) That a shield was unnecessary between the boring mill and the driving-box space.

(3) That the plaintiff could perform the work assigned to him with his back to the boring mill, and that he unnecessarily exposed himself to danger.

(4) That in the position of the plaintiff's head at the time he was stricken, a chip from the boring mill could not enter his eye, without striking some object and rebounding, and therefore that plaintiff was accidentally injured.

(5) That the chip which entered the plaintiff's eye came from the hammer he was using, and not from the boring mill.

The evidence as to damages is not stated, as there is no exception in regard thereto.

The defendant excepted to rulings of his Honor on the evidence:

1. For that the court permitted the plaintiff to testify about the defective condition of the air hammer.

2. For that the court permitted the plaintiff to testify that he would have completed his job upon which he was at work within one and one-half minutes.

3. For that the court permitted the plaintiff to testify that the Shop Foreman Daniels told him a man was disabled or sick or out, and they were behind on the job and that they were in a hurry.

4. For that the court permitted witness J. P. Donovant to testify that when he operated the boring mill three and a half years prior to the accident, that at that time it threw chippings in that driving-box space.

5. For that the court permitted the witness J. P. Donovant to testify that when he worked in the driving-box space 4 or 5 feet east of the steel column, the boring mill threw cuttings on witness's hands and in his face.

6. For that the court permitted I. N. Ayers, plaintiff's witness, to testify that he was standing 25 or 30 feet beyond where plaintiff was working, and that the boring mill threw brass cuttings where he was standing.

7. For that the court permitted C. S. Flood to testify that a couple of days prior to the injury of the plaintiff he was work-

ing in the driving-box space northeast, more north than east, from the boring mill, and that it threw brass cuttings where he was.

There was a motion to nonsuit, which was overruled, and defendant excepted.

The jury returned the following verdict:

1st. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2d. Was the plaintiff's injury caused by his own contributory negligence, as alleged in the answer? No.

3d. What damages, if any, is the plaintiff entitled to recover? Answer: $5,500.

Judgment was rendered thereon, and defendant excepted and appealed.

Edwin C. Gregory for plaintiff.
Linn & Linn for defendant.

ALLEN, J., after stating the case: There is no error in the rulings on the evidence.

The defendant alleges in its answer that the chip which entered the eye of the plaintiff came from the hammer he was using, and it was competent, for the purpose of meeting this contention, to show that on account of the condition of the hammer the plaintiff was not striking with it at the time he was injured. The evidence that the plaintiff would have completed his job upon which he was at work within one and a half minutes is of little importance, but is relevant to the inquiry. The plaintiff testified that the boring mill was not in operation when he began to work, and that the chip entered his eye almost instantly, and it was proper for the jury to have before them the length of time he would be engaged at work, in determining whether his conduct was negligent.

If the boring mill was not in operation, and he could complete his job in two minutes, the jury might say it was not imprudent to work with his face to the mill, and that he ought to have taken greater precautions for his safety if required to remain longer.

What the foreman said as he directed him to do the work, and evidence that the boring mill had thrown chips in the driving-box space before the day of the injury to the plaintiff, were properly admitted.

The burden was on the plaintiff to prove that the place where he was at work was unsafe, and that the defendant knew it to be so, or that it could have discovered it by the exercise of ordinary care (*Hudson v. R. R.,* 104 N. C., 491; *Nelson v. Tobacco Co.,* 144 N. C., 420; *Blevins v. Cotton Mills,* 150 N. C., 499), and evidence that a condition has existed for a long time is evidence of knowledge. *Cotton v. Mfg. Co.,* 142 N. C., 531; *Cotton v. R. R.,* 149 N. C., 227.

There are several assignments of error to the refusal to give certain special instructions, all of which, we think, were covered by the charge, but if not, they could not be ground for a new trial on this record.

At the close of the evidence, at 5 o'clock P. M., the judge adjourned court until 9 o'clock next morning. Upon the opening of court next morning, plaintiff tendered in writing his prayers for instructions, duly signed by his counsel. Counsel for defendant tendered in writing prayers for instructions, but which were not signed.

After the court had given to the jury the general charge, and while the court was reading to the jury the plaintiff's prayers for instruction, defendant's counsel signed the prayers which it had tendered unsigned as aforesaid, and handed them to the court. The court then read defendant's said prayers numbered 1, 2, 7, 9, and 11. The court did not give defendant's other prayers except as contained in the court's general charge to the jury.

The statute (Rev., sec. 538) is imperative that counsel must sign prayers for special instructions, and that upon failure to do so the judge may disregard them, and the judge need not put his refusal of the instructions on the ground that they were asked too late. As was said by the present *Chief Justice* in *Posey v. Patton,* 109 N. C., 457, "The law does that."

That the instructions were not presented in apt time when signed and finally handed up, after the argument closed and the charge concluded, is well settled.

In *Craddock v. Barnes,* 142 N. C., 92, it was held that prayers for instructions in due form ought to be considered, if requested before the argument begins, and *Justice Walker* there says: "The time within which instructions should be requested must be left to the sound discretion of the court, as in the case of many other matters of mere practice or procedure, and we will be slow to review or interfere with the exercise of that discretion; but the presiding judge should, and we are sure he always will, so order his discretion as to afford counsel a reasonable time to prepare and present their prayers. Counsel should perform this duty to their clients seasonably and with a proper regard for the right of the trial judge to require that he should have reasonably sufficient time to write his charge and to consider the prayers for special instructions; and what time is required by each must be determined by the nature and exigencies of each case."

In *Biggs v. Gurganus,* 152 N. C., 176, the question is again considered, and *Justice Brown* cites with approval *Craddock v. Barnes, supra,* and says: "It is well settled that special instructions must be in writing and handed up before argument commences."

The question remaining is the refusal of the motion to nonsuit, and this involves the consideration of the duty which the defendant owed to the plaintiff, and whether the evidence, viewed in the light most favorable to the plaintiff, shows a breach of that duty, causing his injury.

In all courts where the common law is administered it is held that one cannot recover damages upon proof of negligence alone, and that he must proceed further and show that the negligence of which he complains was the real proximate cause of his injury. He cannot recover because a place where employees work is dangerous, unless he was injured by the unsafe place. He cannot say, There was an unsafe place in the shop where I was working, and while it is true I was not working at that place, I fell in another part of the shop and broke my leg, and therefore ask for damages.

The counsel in this case do not contend otherwise, but the difficulty arises in the application of the rule.

"We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work." *House v. R. R.,* 152 N. C., 398, and "it is accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employees, in the exercise of proper care, a reasonably safe place, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind" (*Hicks v. Manufacturing Co.,* 138 N. C., 325), and "the duty of providing a reasonably safe place in which to work is one of the primary or absolute duties of the master; and when the master delegates the discharge of such duty to a servant, he represents the master, and the latter will be held responsible for the manner in which the duty is discharged." *Shives v. Cotton Mills,* 151 N. C., 293.

The relative duties of the employer and employee, and the doctrine of contributory negligence and assumption of risk, as applied to the conduct of the employee, are well stated by *Justice Hoke* in *Pressly v. Yarn Mills,* 138 N. C., 416, in which he says: "It is suggested that if a negligent failure to furnish a shifter is declared to be the proximate cause of the injury on the part of the employer, by that same token the employee, working on when aware of the defect, is also negligent, and such negligence should be held to be concurrent, and to hold otherwise would require the master to take more care of the servant than the servant takes care of himself. This position finds support in some of the decided case, but the Court does not think it is in accord with the better considered adjudications on the subject. The position had its origin in some of the older decisions, rendered when the employment of labor was much more restricted and the implements and appliances were comparatively simple and attended with little danger. At that time it was considered of little consequence what the employee assumed, and as matter of fact he assumed the risk of almost everything that happened to him. As business enterprises, however, were enlarged, and extended, and machinery became more complicated, and larger numbers of men were being employed in its operation, it was found that the position here contended for was not a proper one by which to determine the relative rights and duties of employer and employee in regard to defective machinery and appliances. It was based upon an entirely erroneous conception, that there was a perfect equality of position between the two in respect to such defective appliances; but nothing is further from the fact, and for the reason, chiefly, that the employer controls the conditions in which the employees do their work. His duty to furnish machinery and appliances reasonably safe and suitable, such as are approved and in general use, in the exercise of a reasonable care, is absolute. As a rule, he buys the machinery from the manufacturer or dealers, who are experts, and can change when he desires; he selects and employs a superintendent and skilled labor, and has the time and opportunity to inform himself as to the character of the machinery he buys and the hazards incident to its use, and, accordingly, the principle which holds the employee to an equality of obligation and responsibility in the respect suggested is unsound and unjust and has been rejected in the more recent and better considered cases."

Negligence is the failure to perform a duty imposed by law. It is the failure to exercise that care which a man of ordinary prudence would have exercised under existing circumstances; and where conditions change, the degree of care required changes with them.

In former days, tools were simple, and the mechanic and his tools were inseparable. He used them daily, and by use became familiar with their qualities, and the dangers incident to his employment, and there was less reason for holding the employer to a high degree of care than now, when complicated machinery, selected by the employer, is used, and when the employee is practically separated from his tools.

There are also in large shops, where many machines are in operation, as in the one where the plaintiff was working, dangers that are not traceable to any particular machine, but are incident to the business. These cannot generally be made the basis of a cause of action, but the knowledge that they exist imposes upon the employer the duty of exercising greater care.

Applying these principles, there was no error in denying the motion to nonsuit.

There was evidence that the plaintiff was employed on the day of his injury; that he had not, before this, seen the place where he was required to work; that when he began to work, the boring mill was not in operation; that there was much noise in the shop from machines; that it was necessary for him to face the boring mill in the performance of his duty; that as he began to work, the boring mill, which was boring brass, started and a brass chip struck him in the eye; that he was not using the hammer at that time; that chips from the boring mill are hot and those from the hammer cold; that his eye was blistered; that the chip taken from the eye was from the boring mill; that the boring mill was throwing chips in the space where he was working; that the boring mill had thrown chips into this place where employees were required to work several years; that shields around boring mills were in general use, and that they were movable and should be placed between the mill and the employee; that there was no shield between the mill and the plaintiff, and that if one had been there he would not have been injured.

There was much evidence to the contrary, but, on a motion to nonsuit, the law requires us to accept as true those facts which the evidence tends to prove, and we therefore hold that there was evidence of negligence on the part of the defendant which was the direct cause of the plaintiff's injuries.

There was a conflict of evidence as to contributory negligence, and it was submitted to the jury, under proper instructions.

In our opinion, there was no aspect of the case in which the issue of assumption of risk arose. The doctrine is very generally applied that the duty to provide a safe place to work is an absolute duty, which cannot be delegated, and that the breach of this duty is negligence. It is also accepted law that the risks assumed by the employee are the ordinary risks of the employment, and that he does not assume the risk of the employer's negligence.

It would seem to follow, when the jury answers the first issue "Yes," and thereby establishes the negligence of the employer and that this negligence was the real proximate cause of the injury, that there can be no assumption of risk which will prevent a recovery.

It is, however, permissible to consider the knowledge of the employee, his familiarity with conditions, and other circumstances, on the issue of contributory negligence.

Upon an examination of the whole record, we find

No error.

H. L. BECK & CO. v. BANK OF THOMASVILLE ET AL.

(Filed 15 November, 1911.)

Appeal and Error—Account—Reference—Slander—Damages—Appeal Premature—Practice.

In an action against a bank, alleging certain errors in the accounts of the bank with the plaintiff and asking correction thereof, and seeking damages for slander, injury to credit, and the wrongful protesting of plaintiff's checks, an order of reference was made as to the matters of account, expressly reserving for trial the issues in the pleadings as to slander, etc.: *Held*, an appeal from the judgment upon exceptions to the referee's report, before the trial upon the issues reserved, is premature, and will be dismissed without prejudice.

APPEAL by plaintiff from *Lyon, J.*, at February Term, 1911, of DAVIDSON.

E. E. Raper, Walser & Walser, and Thomas J. Shaw for plaintiff.

Watson, Buxton & Watson for defendant.

ALLEN, J. The plaintiff instituted two actions in the Superior Court of Davidson County, one being against the Bank of Thomasville and the other against J. L. Armfield, its cashier. These actions were consolidated by order of court.

The plaintiffs allege certain errors in their account with the bank, which they ask to have corrected, and also that they are entitled to recover damages for slander, injury to their credit, and the wrongful protesting of checks they issued.

No objection was made as to misjoinder, and at August Term, 1909, an order of reference was made as to "all matters of account involved in the actions," but expressly reserving for trial by jury "the issues raised in the pleadings as to slander, refusing payment of checks, and protesting checks for nonpayment and other torts."

The referee filed his report, and upon exceptions being filed, the judge heard the same, and entered his judgment, from which an appeal is taken to this Court. The issues reserved in the order of reference have not been tried.

In this condition of the record, the appeal is premature and must be dismissed.

As was said by *Justice Hoke* in *Pritchard v. Spring Company,* 151 N. C., 249: "If a departure from this procedure is allowed in one case, it could be insisted upon in another, and each claimant, conceiving himself aggrieved, could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemly and proper disposal of causes prevented."

The appeal is dismissed without prejudice to the right of the parties to reserve their exceptions, which will be considered upon an appeal from the final judgment.

Appeal dismissed.

JOHN W. JOHNSON v. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Filed 15 November, 1911.)

Insurance—Assignment of Policy—Good Faith—Insurable Interest.

An insured who had taken out on his own life a policy of life insurance, payable to himself, and who had paid the first and subsequent premiums thereon, may, not as a cloak or cover for a wagering transaction or as a mere speculation, but in good faith and for a valuable consideration, make a valid assignment of the policy, which will be binding upon the insurance company, to a person having no insurable interest in his life; and the person to whom the policy has thus been assigned may recover thereon of the insurer. *Hardy v. Insurance Co.*, 152 N. C., 286; *s. c.*, 154 N. C., 430, cited and approved as settling this doctrine.

APPEAL by defendant A. J. Fagg, administrator, from *Adams, J.*, and a jury, at May Term, 1911, of STOKES.

J. H. Humphreys and Manly, Hendren & Womble for plaintiff.

J. W. Hull and Watson, Buxton & Watson for appellant.

WALKER, J. This is an action by the plaintiff to recover from the defendant insurance company the amount of a certain insurance policy, issued to Virgil L. Eaton on his life, and assigned by Eaton to the plaintiff. The defendant company at no time contested its liability on this policy, and has at all times expressed its willingness and desire to pay the amount due thereon to the person entitled to receive it, and in its answer it expressed its willingness to pay and recognized that the amount of the policy was due to some one, but relied upon the fact that the administrator of Virgil L. Eaton was contesting the right of the plaintiff to receive the proceeds of the policy, under the assignment, and was claiming that it should be paid to him, and asked that it be allowed to pay into court the amount due on said policy, and that the court should order the said sum to be paid to the party entitled thereto. In consequence of this answer, and in accordance with its prayer, the administrator was made a party defendant and the insurance company paid the sum due under the policy into the office of the Clerk of the Superior Court of Stokes County, to abide the judgment of the court. The administrator of Eaton, the original beneficiary, filed an answer, in which he set up two defenses: First, That his intestate had borrowed of the plaintiff the sum of $100 and as security for said loan had transferred and assigned the said policy to the plaintiff as collateral security; second, that the assignment of the policy by Eaton to the plaintiff was void as a wagering transaction, for that the plaintiff had no insurable interest in the life of Eaton. The contest is, therefore, between the plaintiff, who is the assignee of the policy, and the administrator of Eaton.

The jury, in response to the issues submitted to them, found that the plaintiff had nothing to do with the taking out of the policy by Eaton, and that the assignment of the policy was made in good faith, and not as a cloak or cover for a wagering transaction or speculation on the life of Eaton. The evidence was to the effect that the plaintiff knew nothing about Eaton taking out the policy until after it was issued and the first premium paid, and that Eaton became dissatisfied and endeavored to dispose of the policy to other persons before coming to the plaintiff, but finally sold and assigned the policy to the plaintiff in accordance with the assignment as set out in the record. In fact, there was no dispute or evidence to the contrary, and as a result thereof the court charged the jury, if they believed the evidence, to answer the first issue "No." The second issue, as to the good faith of the assignment, was answered by the jury, under the charge of the court, in favor of the plaintiff. There was no evidence offered to support the contention of the administrator that the policy had been assigned as security for a debt. The exceptions of the administrator are to the charge of the judge, and, as we understand, they raise this single question: Can a person take out a policy of insurance on his own life, making the policy payable to himself, and pay the first or subsequent premiums, and then in good faith and not as a cloak or cover for a wagering transaction or as a mere speculation and for a valuable consideration, assign the policy to a person having no insurable interest in the life of the person insured, and can such person recover upon the policy under such an assignment, or does the simple fact that the assignee had no insurable interest in the life of the assignor invalidate the assignment and prevent a recovery by the assignee?

The defendant, administrator of Virgil L. Eaton, appealed from the judgment upon the verdict.

It is impossible to distinguish this case from *Hardy v. Insurance Co.*, 152 N. C., 286, and again reported in 154 N. C., 430, and our decision, therefore, must be against the plaintiff and in affirmance of the judgment below, unless we overrule those cases, as requested to do by the plaintiff's counsel in their brief. They are recognized by them to be decisively against the contention of the defendant that plaintiff, as assignee, cannot recover on the policy.

In *Hardy v. Insurance Co.,* 152 N. C., 286, *Justice Hoke,* who wrote the opinion for the Court, says, after a most learned and exhaustive discussion of the question, that the great weight of authority sustains the legality of such an assignment, when it is found as a fact that the policy was valid at its inception and, further, that the assignment was made in good faith and not as a mere cloak or cover for a wagering transaction. He quotes with approval what is stated upon the subject in that reliable treatise and standard authority, Vance on Insurance, p. 14 *et seq.,* as follows: "'On principle and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly valid if made in good faith, and not as a cover for fraudulent speculation in life.' And referring to the opinions in *Warnock v. Davis,* 104 U. S., 775, and *Cammack v. Lewis,* 82 U. S., 643, and to the subject generally, the author says: 'These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure, by assignment, insurance that he could not procure directly. A fair statement of the issue is found in the postulate, that the law will allow the insured to designate a beneficiary under the policy as well by assignment as by original nomination. The true principle governing the question may be derived from the statement of some generally accepted rules of law: (1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary. (2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial. (3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action it has, at any time after its issue, a recognized value, termed the reserved value. Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy.' This, we think, correctly states the true doctrine."

That decision was approved, when the same case afterwards came to this Court by appeal, in a lucid opinion by *Justice Allen*, 154 N. C., 430; so that the law, as applicable to the facts found by the jury, must now be considered as thoroughly settled in this State, whatever may be the views of other courts.

There was no error in the ruling of *Judge W. J. Adams*, and it will be so certified, that the judgment in favor of the plaintiff may be enforced.

No error.

B. F. BRITE AND WIFE, LAURA, v. GEORGE PENNY, CAROLINA LOAN AND REALTY COMPANY ET AL.

(Filed 22 November, 1911.)

1. **Deeds and Conveyances—Privy Examination—Purchaser—Notice—Fraud—Burden of Proof.**

   The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason.

2. **Deeds and Conveyances — Fraud—Sale of Stock — Mortgages — Misrepresentations—Evidence—Questions for Jury.**

   Evidence to set aside for fraud a mortgage deed given to the defendant by plaintiff to secure money with which to purchase stock the defendant was offering for sale examined and held to be sufficient for submission to the jury.

3. **Principal and Agent—Corporations—Officers—Fraud—Corporate Acts—Evidence.**

   A corporation dealing in stock is fixed with notice of a fraudulent transaction induced by its president, secretary, treasurer, and owner of nearly its whole stock, in which a large profit in the sale of the stock has been realized in the usual business channels of the company, the stock sold having been listed with the corporation for sale; and the transaction complained of will be deemed, in the absence of evidence to the contrary, to have been done in behalf of the corporation and not of the officer who consummated it in his individual capacity.

APPEAL from *O. H. Allen, J.*, at August Term, 1911, of GUILFORD.

Civil action to set aside and cancel a note and mortgage for $2,000, executed by the *feme* plaintiff on her property to the defendant corporation, tried at August Term, 1911, of the Superior Court of Guilford County, his Honor, *O. H. Allen, J.*, presiding.

These issues were submitted to the jury:

1. Did the defendant George T. Penny by false representations and fraud, as alleged in the complaint, procure the execution of the note and mortgage described in the complaint? Answer: Yes.

2. Did the defendant Carolina Loan and Realty Company, at the time of the execution of the mortgage and the issuance of its check for $2,000, have notice of such fraud? Answer: Yes.

4. Was the privy examination of Laura Brite to the mortgage described in the complaint taken as required by law, that is, separate and apart from her husband? Answer: No.

From the judgment rendered the defendant appealed.

Justice & Broadhurst for plaintiff.

King & Kimball and Thomas S. Beall for defendants.

BROWN, J. The assignments of error bring up for consideration practically three propositions:

1. The finding upon the fourth issue alone would not be sufficient to uphold the judgment.

The act of the General Assembly, Laws of 1889, ch. 389, Revisal, sec. 956, has been heretofore construed, and it is held that "The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate in all respects regular, unless the grantee had notice of it, and the burden would be upon the plaintiffs to show such notice." *Davis v. Davis,* 146 N. C., 163; *Hall v. Castleberry,* 101 N. C., 155.

In this connection we will say that the concurring opinion of *Clark, J.*, in *Benedict v. Jones*, 129 N. C., 474, is a clear presentation of the law and receives our indorsement. In it the learned judge points out strongly the great danger to the security of titles which would result if the reasoning of the Court on that case is carried to its logical conclusion, and well says: "It was, as is well known, to cure the effect of a decision of this Court that a privy examination did not have the effect of a fine and recovery (as had been understood by the profession) that chapter 389, Laws 1889, was passed."

2. Is there any evidence of fraud? It is not for us to say that Penny acted fraudulently, but whether there was evidence enough to justify his Honor in submitting that issue to the jury.

All the evidence was introduced by the plaintiffs and none by the defendants.

The evidence offered tends to prove that Moser was the owner of twenty shares of stock of the par value of $100 each in the High Point Planing Mill Company; that at the time of the transaction that corporation was insolvent, and it is a legitimate inference that Penny knew it. This stock was placed in Penny's hands for sale by Moser, who was to receive only $800 of the proceeds and Penny was to receive the remainder. Penny or his corporation actually received $1,200 for their part. Penny approached *feme* plaintiff to sell her the stock and to give him a mortgage on her house and lot. She at first declined, and afterwards agreed to buy. She told Penny she knew nothing about the stock and relied on him. Penny assured her of its value, said the corporation owed but little and had an account due sufficient to pay. He told *feme* plaintiff that he owned stock in the planing mill and her husband could be secretary and treasurer at $75 a month, with an increase as the business grew to $150 a month. The *feme* plaintiff further said: "Mr. Penny did not tell witness whose stock this was he was selling. He said Mr. Moser was dishonest and that the firm—the reason they were standing still then and wasn't working, he said that they wanted to get Mr. Moser out; he was tricky and dishonest. Mr. Penny did not state that Mr. Moser was in the business further than that."

Q. You understood it was Mr. Moser's stock you were buying? A. No, sir.

Q. Whose stock did you understand it was? A. I did not know whose stock it was. He said he had bought out twenty shares, and if witness would take $2,000 stock in it it would give witness and Mr. Penny the controlling interest.

Penny further told plaintiff he had bought Loughlin and Dodamead's stock for himself, and further, that "we would make so much money, 20 per cent on the dollar from the start." Plaintiff further testifies that: "Mr. Penny said, 'Don't you appear to be overanxious about this; if you do, Mr. Moser will back out. I don't think he wants to sell very badly, anyway.' So he looked out of the window and saw Mr. Moser and Mr. Ingold approaching, and he said, 'There comes the boys now.' And when they came in he reached his hand in his pocket and pulled out some stock and said, 'Well, Mr. Moser, I have bought out Mr. Dodamead since I saw you,' and Mr. Moser says, 'You have?' and he says, 'Yes,' and Mr. Moser says, 'You have been hustling since I saw you last.'"

Q. What occurred then? A. On the 17th I said to Mr. Penny, "Is there any indebtedness on this stock?" He said, "Nothing to amount to anything; I have looked over the books and there is a little indebtedness, but there is an outstanding account that will overbalance all the indebtedness on the stock. I will see all that out; don't you have any uneasiness whatever. I will see that is all right; we will be running here in two or three days."

Penny did not offer himself as a witness and deny any of these charges. He did not show that he owned any stock in the planing mill, or that he had purchased Dodamead's or Loughlin's stock. The planing mill never commenced operations again and was very shortly forced into bankruptcy by its numerous creditors.

We will not recite further from the evidence in the record, and comment is unnecessary. That his Honor was justified in submitting the first issue to the jury is manifest from a simple recital of the facts in evidence.

3. Is the Carolina Loan and Realty Company, upon the facts in evidence, bound by Penny's acts?

Upon this phase of the case we were strongly impressed by the forcible argument of counsel for defendant, but a close analysis of the evidence discloses that the principles of law so earnestly contended for by them do not apply.

We recognize the general doctrine held by all courts, that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in any official or representative capacity for the corporation. *Bank v. Burgwyn,* 110 N. C., 267; *LeDuc v. Moore,* 111 N. C., 516; *Bank v. School Committee,* 118 N. C., 383; *Kennedy v. McKay,* 14 Vroom (N. J.), 288; 39 A. R., 561. But that doctrine cannot be successfully invoked by the realty company under the facts of this case.

His Honor substantially charged the jury upon the third issue that if Penny acted for the corporation *in this transaction* the company would be bound by his conduct, and that the realty company is presumed to know what its agent knew.

This is elementary law and has been invoked repeatedly in the cases of insurance companies whose agents make false representations in selling insurance. *Caldwell v. Insurance Co.,* 140 N. C., 100; *Frazell v. Insurance Co.,* 153 N. C., 60.

What was the "transaction" in this case? It was the sale of the stock for Moser,, and in order to carry out that main purpose, and realize a large profit, the loan of the money on mortgage by the realty company was incidentally necessary.

The plaintiff offers part of Penny's examination taken before a commissioner and parts of his answer. Penny states that he is president as well as secretary, treasurer, general manager, and the person who looks after all the affairs of the Carolina Loan and Realty Company, and "that it is true that the sale by said Moser of his twenty shares of stock in the said planing mill company to the plaintiff at the price of $2,000 resulted in a benefit to this defendant of $1,200 in pursuance of an arrangement made with this defendant by the said Moser at the time said stock was listed with this defendant for sale, to the effect that such sum as might be realized upon the sale of said stock within the time limited, whether sale were effected by this defendant or by the defendant Moser, should belong to this defendant after the said Moser had received net therefor the sum of $800."

It thus appears that Penny was not selling his own stock, but was selling Moser's stock, which had been listed with him for sale at a huge commission. Now, with whom was that stock listed for sale—with Penny individually or his corporation, of which he was practically the "whole thing"?

The corporation was not engaged in a banking business. It loaned money, it is true, and it dealt in real estate, but it also was a dealer in *stocks* and bonds, and when Moser listed his stock for sale through Penny, he listed it with the corporation. It is not to be supposed that Penny, the corporation officer, was acting adversely to the interests of his corporation that employed and paid him and was engaged in selling stocks on his own account, thereby constituting himself a rival in business to his corporation and both occupying the same place of business.

The law would not permit him to act in any such double capacity to appropriate business for himself belonging legitimately to his corporation and to reap the profits of it. Good faith to the stockholders forbade it.

Penny did not advance the money to pay for this stock, but it was the corporation's money, as evidenced by this check:

CAROLINA LOAN AND REALTY COMPANY, No. 479
REAL ESTATE, LOANS, STOCKS AND BONDS.
HIGH POINT, N. C., May 18, 1909.

Pay to the order of B. F. Brite and Laura Brite 2,000 dollars.

CAROLINA LOAN AND REALTY CO.,
By GEORGE T. PENNY, *Sec.-Treas.*

HOME BANKING COMPANY,
HIGH POINT, N. C.
Mtg. due 5-11-1911.

Stamped on the face of the above check: "Cashed. Home Banking Company. Paid May 18, 1909. High Point, N. C."

Indorsed on the back of the check: "B. F. Brite, Laura Brite."

This check was at once turned over to Moser, and Penny admits he received his share of it.

It is unjust to Penny to suppose that he was using the corporation's funds to make $1,200 for himself in the sale of stocks, when dealing in stocks was a part of the corporate business intrusted to his management. It is a significant fact that in its separate answer in the case the realty company does not allege that Penny was not acting for it.

In any view of the evidence in this case, his Honor would have been warranted in charging the jury as matter of law that the Carolina Loan and Realty Company is bound by Penny's acts in selling Moser's stock to the *feme* plaintiff.

Upon a review of the entire record, we find

No error.

LEXINGTON GROCERY COMPANY v. PHILADELPHIA CASUALTY COMPANY.

(Filed 22 November, 1911.)

1. **Insurance—Credit Bonds—Contracts—Evidence.**

In this action brought upon a contract to indemnify against loss by giving credit, the application bond, and Schedule A, to which the bond refers, are construed as a contract of insurance between the parties.

2. **Insurance—Credit Bond—Contracts—Construction—Intent.**

A contract indemnifying a merchant against a credit loss should be construed more strongly against the insurer, and ambiguities should be reconciled, if possible, by gathering the intent of the parties from the whole instrument; and if the particular clause requiring interpretation cannot be thus brought into harmony with the rest of the contract touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured.

3. **Same—Ambiguity—Void Provisions.**

When in an application by a merchant for a bond of indemnity for credit losses it is provided, "Experience shall be the basis for credit under the bond as specified on Schedule A," with a specified account limit, and it is expressly stipulated in the bond that Schedule A shall describe the class of customers to be covered by the bond, which specifies three classes of debtors, which may be termed old customers, new customers, and those who are solvent, the fact that nothing is said in this schedule about insolvency at the time of the execution of the bond, when defining old and new customers, and that it is expressly provided that as to "outstandings" only those of the debtors who were solvent when the bond was executed were insured, indicates clearly the intent to insure the debts of old and new customers, created after the execution of the bond, although insolvent, provided the credit extended was based upon the experience of the insured; and an ambiguity in a different section of the bond, which is repugnant to the intent gathered from the whole instrument, that experience is to be the basis of credit extended, is void.

4. **Insurance—Credit Bond—Intent—Construction.**

An application for a bond of indemnity by a merchant for credit losses provided that credits covered by the bond were to be extended to customers upon the basis of experience, with limitation as to amount, etc., as contained in Schedule A of the bond accordingly issued. Paragraph 12, subsection B, of the bond, provided that it covered "the insolvency, etc., in this subsection" occurring between the date of the execution and termination of the bond. When construed in connection with the other parts of the bond under consideration in this case: *Held*, that experience being the basis of credit and that the debts insured are those covered by Schedule A, the intent of subsection B of paragraph 12 was to provide evidences of liability that would be satisfactory for small claims that did not exceed $150, which were divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond.

APPEAL from *Lyon, J.*, at April Term, 1911, of DAVIDSON.

The plaintiff is a corporation, doing business as a wholesale grocer at Lexington, N. C., and the defendant is a corporation which issues credit bonds upon certain conditions and in consideration of premiums paid.

On or about 22 January, 1908, the plaintiff made application to the defendant to issue for its benefit a credit bond, and in said application it is provided: "Experience shall be the basis for credit under the bond as specified on Schedule 'A,' with a single account limit not exceeding $2,000, shall be covered by said bond."

The premium was paid and on 27 January, 1908, said bond was issued in accordance with the application, and contains the following stipulations, among others not necessary to be stated:

"First. If between the date of the execution of this bond and 22 January, 1909, on goods usually dealt in and at the time of shipment and delivery, solely owned by the indemnified and shipped *bona fide* and in the regular course of business since 23 February, 1908, the company receives preliminary notices of loss as required by this bond and Schedule A, upon which claim the actual loss sustained by the indemnified thereon as covered by this bond and Schedule A is in excess of $1,000, hereinafter called the initial loss, on sales and shipments not exceeding $400,000, or, if such sales and shipments as aforesaid exceed such sum, a proportionally increased initial loss, the company agrees to pay such excess loss, not exceeding the amount of this bond: *Provided,*

"(*a*) That such losses shall have been sustained on claims against debtors, each of whom is covered by Schedule A attached hereto, signed by the president and secretary and countersigned by the actuary and one of the registrars of the company, and which is made a part hereof: *Provided further,* that when a mercantile agency is designated in the application as a basis for some or all of the credits to be covered by this bond, that the last book printed by such agency prior to the shipment of the goods shall be the basis for covering such shipments from and including the first of the month appearing on such book.

"(*b*) That only claims on which losses occur, which exist (1) against a debtor who has effected a general compromise with his creditors; (2) against a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the Federal bankruptcy law, or under some insolvency or assignment law of any of the United States or any territory thereof; (3) against a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied; (4) against a debtor whose stock in trade has been sold in judicial proceedings; (5) against a debtor against whom, upon the ground of insolvency, a writ of attachment or replevin or other process has been issued; (6) against a debtor who, upon the ground of insolvency, has transferred his stock in trade to a trustee or assignee under some assignment law for the benefit of his creditors; (7) against a debtor who has died, leaving his estate insufficient to pay his debts in full, and such fact is certified to by the executor or administrator or any court having jurisdiction thereof, and such certificate or a copy thereof is attached to the preliminary notice of loss; (8) against a debtor who, being a corporation, firm, or individual for whom a receiver has been appointed upon the ground of insolvency; (9) against a debtor where the legal proceedings show that, to defraud his creditors or avoid the payment of his debts, he has sold out or transferred his stock in trade; (10) against a debtor who has given a chattel mortgage for the benefit of his creditors; (11) against a debtor who has been found to be insolvent through judicial proceedings; (12) where a claim does not exceed $150 and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practicing attorney in or near the place where the debtor did business reports, in writing, as to each of such claims, and such report is attached to the preliminary notice of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectible and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, and any claim which is more than three months overdue prior to commencement of said bond, and any claim that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of said bond shall not be covered by this (12th) paragraph, but shall, so far as the same are covered by this bond and riders attached hereto, be included in the calculation of losses, provided the insolvency and one of the foregoing facts as enumerated in this subdivision 'b' occurs between the date of the execution and the termination of this bond.

"Second. Said Schedule 'A' shall describe the class of customers to be covered by this bond and the limit of credit to be extended to each of such customers."

Schedule A is as follows:

"CC. Customers to whom the indemnified has shipped goods within twelve (12) months prior to shipping the first item of the goods, wholly or partly included in the account upon which the loss was incurred, shall be considered old customers, and customers to whom the indemnified has shipped no goods within said twelve (12) months, or to whom the indemnified never sold any goods, shall be considered new customers.

"KK. Subject to the terms and conditions of the attached bond and this rider, old customers of the indemnified shall be covered for goods shipped during the term of the attached bond for an amount not exceeding the highest indebtedness such customer owed to the indemnified at one time, for goods shipped by the indemnified to such customer within twelve (12) months prior to shipping the first item of the goods wholly or partly included in the account upon which the loss was incurred, not exceeding, however, the amount paid upon such highest indebtedness during said period, but in no event exceeding $2,000 to one customer.

"LL. New customers of the indemnified shall be covered for an amount not exceeding fifty per cent (50%) of the first bill, but the gross amount of such first bill shall not exceed $1,000, and such customer shall be considered an old customer as to goods shipped after the first bill has been paid, and shall then be covered accordingly.

"RR. As a condition precedent to having any claim for excess loss under the attached bond and this rider, by reason of any loss or losses on such old or new customers, the indemnified shall attach to the preliminary notice of each loss, if an old customer, a copy of the account upon which the loss was incurred, and a copy of the account, with debits and credits, showing the highest prior indebtedness within said twelve (12) months; and if a new customer, a memorandum must be attached to the preliminary notice of the loss, stating that such customer was a new customer, or else such loss or losses shall be excluded from the calculation of losses.

"The words 'and the aggregate of all such claims filed does not exceed one-half of the initial loss,' in lines 51 and 52 of the attached bond, have been made void.

"The words beginning with the word 'there,' in line 70, and ending with the word 'and,' in line 82, have been made void.

"O. Outstandings on the books of the indemnified against solvent debtors on 23 January, 1908, shipped since 1 October, 1907, shall be covered upon the same conditions and shall be included in the same manner as if the goods had been shipped since the execution of the bond.

"Subject to the terms and conditions of the attached bond."

This action is to recover on said bond for losses, which the plaintiff alleges it has sustained.

An account between the parties was stated by a referee, and upon his report being filed, judgment was entered in favor of the plaintiff for the sum of $3,693.38, and the defendant excepted and appealed.

The exceptions present one question, and that is, whether accounts made after the execution of the bond, by persons who were then insolvent, are covered by the bond, if based on the past experience of the plaintiff with the persons making the accounts, and the defendant relies particularly on the proviso to paragraph 12 of subsection "b" of the bond, which reads as follows: "Provided the insolvency and one of the foregoing facts in this subsection 'b' occur between the date of the execution and termination of this bond."

The referee and his Honor held that such accounts were covered by the bond, and defendant excepted.

E. E. Raper and McCrary & McCrary for plaintiff.
Walser & Walser for defendant.

ALLEN, J. The application, bond, and Schedule A constitute the contract between the plaintiff and defendant, and it is a contract of insurance. *Shakman v. Credit System Co.*, 92 Wis., 374.

Speaking of such contracts, *Lacombe, Circuit Judge,* says, in *Tebbetts v. Guarantee Co.*, 73 Fed. Rep., 96: "Insurance against mercantile losses is a new branch of the business of underwriting and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract, have naturally tended to make the forms of policy crude and difficult of interpretation," and he quotes the rule of construction of ambiguous clauses laid down by him in *Guar. Co. v. Wood,* 68 Fed. Rep., 529: "As that contract is a voluminous document, prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman. . . . If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument considered as a whole is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured."

Frost on Guar. Ins., p. 572, also says, as to the rule of construction, that, "All conditions limiting liability are to be strictly construed. In the interpretation of conditions they are to be construed liberally in favor of the insured and strictly against the insurer. The policy should be interpreted in such a way as to accomplish the general purpose had in view, and at the same time give effect to all of its conditions, according to their fair and reasonable meaning."

The contract before us is based on experience, not on rating, and this means "the plaintiff's experience with the several customers. In other words, the defendant was willing to insure the credit of each of plaintiff's customers to an amount that plaintiff's experience with such customers indicated would be a reasonably safe credit." *Steinwender v. Cas. Co.,* 126 N. Y. Sup., 271; *Cas. Co. v. Cannon,* 133 Ky., 748.

It is also expressly stipulated in the bond that Schedule A shall describe the class of customers to be covered by the bond, and if we turn to Schedule A we find three classes of debtors, which may be termed old customers, new customers, and those who are solvent owing outstandings. The fact that nothing is said in this schedule about insolvency at the time of the execution of the bond, when defining old and new customers, and that it is expressly provided that as to outstandings only those of debtors who were solvent when the bond was executed are insured, indicates clearly that it was the purpose of the defendant to insure the debts of old and new customers, created after the execution of the bond, although insolvent, provided the credit extended was based on experience.

If we were to construe the proviso to paragraph 12 of subsection "b" as the defendant contends, and hold that claims against debtors who were insolvent at the time the bond was executed, although based on experience, are not protected by the bond, we would change the entire contract between the parties, and say that experience is not the basis of credit under the bond, but solvency.

It is argued that the construction contended for by the plaintiff is unreasonable, and that it cannot be supposed that the defendant would permit sales to insolvent persons, and insure them.

It would be sufficient answer to say that it has done so; but if the contract is examined, it will be found that the rights of the defendant are carefully safeguarded.

The plaintiff did not have an unlimited discretion in making sales. Claims against old customers were not insured beyond the highest amount paid by them on indebtedness created within twelve months prior to the execution of the bond, and in no event in excess of $2,000, and the indemnity as to the new customers does not exceed 50 per cent of the first bill, which could not exceed $1,000, and after the first bill, new customers were classed as old customers.

The experience of wholesale and retail dealers has doubtless shown that it is reasonably safe to sell to men who are not solvent, but who have good character and good habits, and who are accustomed to pay, and for this reason experience and not solvency has been adopted as the standard.

This being the plain purpose of the contract, if the proviso relied on by the defendant is repugnant to it, it would be our duty to reject it, but we do not think the repugnancy exists.

Subsections (*a*) and (*b*) are provisos to the first stipulation or agreement in the bond, and subsection (*a*) provides that the debtors included in the bond are those covered by Schedule A, while subsection (*b*) enumerates the evidences of liability by the defendant.

Paragraph 12 of subsection (*b*) is obscure, and it is difficult to ascertain its meaning.

Some word is evidently omitted before the word "shall," and the test of insolvency is to be applied to some claim.

It cannot be applied to the claims of $150 first mentioned in the paragraph, because it says that, in addition to insolvency, one of the foregoing facts enumerated in subsection (*b*) must exist, and it is provided as to the claims first mentioned that it is not necessary for any of the foregoing facts to exist, and it cannot be applied to all the claims covered by the bond, because that would give it an effect which would withdraw claims covered by Schedule A and would make solvency the test.

If we bear in mind the purpose of the contract, and that experience is the basis of credit; that the claims to be insured are those covered by Schedule A, and that subsection (*b*) is intended to furnish the evidences of liability, and read paragraph 12 in the light of these facts, we think the purpose of the paragraph was to provide evidences of liability that would be satisfactory for small claims that did not exceed $150, and that these small claims are divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond. As thus construed, the paragraph reads as follows:

"(12) Where a claim does not exceed $150 and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practicing attorney in or near the place where the debtor did business reports in writing as to each of such claims and such report is attached to the preliminary proof of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectible and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, they shall, so far as they are covered by this bond and riders attached hereto, be included in the calculation of loss, and also any such claim which is more than three months overdue prior to the commencement of this bond, or that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of this bond, shall also be included, provided the insolvency and one of the foregoing facts from 1 to 11 inclusive, as enumerated in this subdivision (*b*), occurs between the date of the execution and the termination of this bond."

In our opinion, there is no error.

Affirmed.

W. A. HOPPER v. S. S. ORDWAY & SONS AND THE AVALON MILLS.

(Filed 22 March, 1911.)

1. **Contracts — Independent Contractor—Negligence—Supervision—Right to Terminate.**

   A responsible party who has contracted to complete a work in its entirety, in this case a mill, is an independent contractor and solely liable as such for damages for personal injuries to an employee working upon its construction; and the fact that the contract with the owner provides for the inspection of the work by the engineer of the latter to ascertain that it comes up to the plans and specifications he has furnished therefor, with clauses of forfeiture under the contract if it does not; and that the engineer may require the contractor under like conditions to put on an extra force to complete the work, if in his judgment it is necessary to do so to bring it within the time agreed upon, do not alter the relationship of independent contractor so as to make the owner liable for damages for his negligence. *Denny v. Burlington*, 155 N. C., 33, cited as controlling.

2. **Same—Interpretation of Contract—Conclusiveness.**

   When there is no right to put an end to a contract to construct a piece of work, in this case a mill, which was to have been done in its entirety by the contractor, but merely the right on the part of the owner to terminate it in the event the contractor should not perform it according to its reasonable stipu-

> lations under the inspection of the engineer of the former, there is no application of the doctrine that "When the employer may at any time terminate the employment, though strong evidence that the employee is a mere servant, it is not conclusive."

APPEAL from *W. J. Adams, J.,* at June Term, 1911, of ROCKINGHAM.

This is an action to recover damages for the death of the plaintiff's intestate, caused, as the plaintiff alleges, by the negligence of the defendants.

The plaintiff was aiding in building the foundation of the mill of the defendant Avalon Mills at the time of his injury, and there is ample evidence of negligence.

The defendant Avalon Mills denies negligence, and alleges that the work was being done by the defendants Ordway & Sons, as independent contractors, and the defendant's counsel say that the only question presented by the eleven assignments of error is whether or no S. S. Ordway & Sons are independent contractors.

There are three paper-writings which constitute the contract between the defendants.

The first is entitled, "Specifications for constructing the masonry abutment and head gates for the Avalon Mills at Mayodan, N. C.," and all specifications relate wholly to the material to be used, except the fourth, seventh, eighth, and ninth, which are as follows:

"4. Mortar shall be composed of two parts clean, sharp sand and one part of Rosendale cement of such brand as the engineer may approve, and mixed and used in such manner as he may direct."

"7. Coping and arch masonry, should any be required, is not to be included in this work, but may be furnished by the company and set in place by the contractor at a fair price to be determined by the engineer."

"8. The work shall be begun within ten (10) days from the time of award of the contract, and be finished and completed within four (4) months thereafter. Should the contractor not prosecute the work with such vigor as to indicate the completion of the work within the time specified, he must increase the force and equipment to such extent as the engineer may deem necessary to complete the work within the prescribed time, or suffer the penalty of a forfeiture of his contract and all the monies that may be due him upon the work at such time as the right may be exercised by the company, party of the second part, viz., The Avalon Mills."

"9. At the end of each thirty (30) days after the work is begun the engineer shall measure up all the finished work, and make due and proper safe allowance for unfinished work, and render an estimate of the amount due the contractor for such work, which amounts shall be paid to him, less ten (10) per cent, which shall be held until the final completion of the work by the contractors."

The second is entitled, "Specifications for constructing the head race or canal for the Avalon Mills Company, at Mayodan, N. C.," and contains detailed statements as to how the work shall be done, and among others, the following provisions: "Should the contractor not prosecute the work with such vigor as to indicate the completion of the work within the time specified, he must increase the force and equipment to such an extent as the engineer may deem necessary to complete the work within the prescribed time, or suffer the penalty of a forfeiture of his contract and all his money that may be due him upon the work at such time as this right may be exercised by the company, party of the second part, viz., The Avalon Mills." "The entire work shall be done in full accordance with the directions and instructions of the engineer or his assistant, and a failure on the part of the contractor to observe and well and truly carry out the work in accordance with the instructions of the engineer or his assistant shall be deemed sufficient cause for the exercise of his forfeiture clause set forth in section (8) by the said Avalon Mills."

The third is entitled, "Specifications to accompany plans of dam, bulkhead gates and spillway for the Avalon Mills, all made for same by C. R. Makepeace & Co., mill engineers, Providence, R. I., August 5, 1899," and after specifying how the work shall be done, says: "In the foregoing specifications it is intended to enumerate all of the leading particulars in the erection and finishing of all this work, and it is understood by the contractor that the same is to be finished complete to the intent and meaning of these specifications and the plans and details, and all materials and workmanship connected with this work must be entirely satisfactory to C. R. Makepeace & Co., or the engineer or superintendent in charge of the work. It is understood by the contractor that should any difference of opinion arise, respecting said workmanship, work or materials, or any other matter whatsoever relative to the erection and finishing of this work, between the contractor and owners, such difference shall be submitted to C. R. Makepeace, and his decision thereon shall be final and conclusive between both parties, and it is so understood and agreed by said parties."

It was in evidence that one of the workmen went to Avalon where the work was being done, upon a telegram sent by the superintendent of the defendant mills, but the superintendent testified that he sent the telegram at the request of Ordway & Sons, who needed a mason, and because they were not acquainted at the place where the mason lived.

The plaintiff contended that, upon the face of the papers, Ordway & Sons were not independent contractors, and requested the judge to so charge the jury, and upon his refusal to do so, excepted.

There was a verdict against Ordway & Sons, but no judgment upon the verdict because of their discharge in bankruptcy.

There is no claim that Ordway & Sons were not responsible parties at the time the contracts were made.

The plaintiff excepted and appealed.

C. O. McMichael and H. R. Scott for plaintiff.

Johnston, Ivie & Dalton, and Manly, Hendren & Womble for defendant.

ALLEN, J., after stating the case: The case of *Denny v. Burlington*, 155 N. C., 33, is decisive of this controversy, and upon that authority, in the absence of other evidence, his Honor might have held as matter of law, upon the papers in evidence, that the relation of independent contractor was established.

In the *Denny case* the city of Burlington entered into a contract for the construction of a system for water and sewerage, in which the details as to material, the work to be performed, and the time of performance were set out with particularity, and it was also provided that the materials furnished and the labor done should be done "in accordance with the specifications and plans, and the instructions to bidders and the proposal and such detailed directions, drawings, etc., that may be given by the engineer from time to time during the construction, and in full compliance with this agreement," and that, "to prevent all dispute and litigation, it is agreed by and between the parties to this contract that the engineer shall in all cases determine the quality and quantity of the several kinds of work which are to be paid for under this contract, and his decisions shall be final and conclusive, and he shall determine all questions in relation to lines, levels, and dimensions of the work and as to the interpretations of the plans and specifications. The committee, through the engineer, shall have the right to make any alterations in the plans or quantity of the work herein contemplated, and it is expressly agreed and understood that such alterations, additions, modifications, or omissions shall not in any way violate this contract, and the contractor hereby agrees not to claim or bring suit for any damages, whether loss of profit or otherwise. . . . Whenever the contractor is not on any part of the work where it is desired by the engineer to give instructions, the superintendent or foreman who may be in charge of that particular part of the work shall receive and obey said instructions from the engineer. . . . But no work other than that included in the contract shall be done by the contractor without a written order from the engineer. . . . The contractor further agrees that if the work to be done under this contract shall be abandoned, or if the contract shall be assigned by said contractor, otherwise than herein provided, or if at any time the engineer shall be of the opinion, and shall so certify in writing to said committee, that the said work is unnecessarily or unreasonably delayed, or that the said contractor is willfully violating any of the terms or conditions of this contract, or is not executing this contract in good faith, or is not making such progress in the executing of said work as to indicate its completion within the time specified, said committee shall have the right to notify said contractor to discontinue all work or any part thereof under this contract, and upon such notification said contractor shall discontinue said work, or such parts thereof as said committee may designate; and said committee shall thereupon have the power to employ by contract, or otherwise, and in such manner and at such prices as it may determine, any persons, etc., which it may deem necessary to work at and be used to complete the work herein described, or such part of it as said committee may have designated." The engineer was appointed by the defendant, and it was held that the person with whom the contract was made was an independent contractor.

It will be observed that not only were the materials to be furnished and the labor to be done, subject to the supervision of the engineer of the defendant, but in accordance with his instructions, and that the defendant reserved the right of inspection and the right to terminate the contract. There are also other provisions extending the authority of the defendant beyond the powers conferred on the Avalon Mills in this case.

The citation from A. and E. Enc., vol. 16, p. 190, that "the fact that the employer may at any time terminate the employment, though strong evidence that the employee is a mere servant, is not conclusive in that regard," is not, in our opinion, applicable to the contract under consideration, because, under that contract, there is no absolute right to terminate the contract at any time, but to put an end to it, if the contractor is not performing it according to the stipulations, which is reasonable and necessary. The same author, on pages 188 and 189, states with accuracy the prevailing rule as to the right to exercise supervision. He says: "A reservation of the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation. The fact that the work is to be supervised by an architect representing the owner is also immaterial if this involves merely his approval or disapproval of the results of the work, and not directions as to the mode of arriving at such results. And it has been held that a provision that the work shall be done under the direction and to the satisfaction of a representative of the employer does not make the employee a mere servant, but that such a provision is merely to secure a satisfactory performance of the work in compliance with the contract. Nor is it material that the contract provides that the employer shall, during the progress of the work, define and direct the scope thereof."

His Honor, instead of deciding the question as matter of law, submitted it to the jury in a charge which is full, clear, and accurate, and which might be copied as a correct summary of the law in determining when one is an independent contractor, and the jury having decided against the plaintiff, there is nothing, upon the appeal, of which he can complain. It is to be regretted that he has a barren recovery for a death caused by negligence, but this consideration will not justify fixing responsibility on a party who is not liable.

We find

No error.

OLA WALKER, ADMINISTRATRIX OF ODELL WALKER, v. CANNON MANUFACTURING COMPANY.

(Filed 22 November, 1911.)

1. **Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Negligence.**

   An employer of labor must furnish the employee a place to do the work assigned to him as reasonably safe as the nature of the business will admit, and when the employment is in the operation of mills and other plants having machinery more or less complicated, and driven by mechanical power, he is required to provide methods, implements, and appliances such as are known, approved, and in general use.

2. **Same—Evidence—Nonsuit.**

   In an action to recover damages for the alleged negligent killing of plaintiff's intestate, employed by defendant to operate a rip-saw in his plant operated by steam, there was evidence tending to show that the saw was "wobbly" and operated with antiquated machinery upon a table that was of an obsolete kind. and by belts nearly horizontally placed. without boxing or guards. so that planks could readily fall upon them under the circumstances of the employment. and cause the injury complained of. by being hurled from the running belt. and in no other manner; that the machinery and appliances furnished were not such as were known, approved, and in general use. and if they had been the injury would not have been inflicted: *Held*, the evidence was sufficient for the jury to find that the plank had been hurled upon the plaintiff's intestate from the unguarded belt. owing to the defendant's negligence, and a motion to nonsuit was properly overruled.

3. **Same—Contributory Negligence—Burden of Proof.**

In an action for damages for the alleged negligent killing of plaintiff's intestate while at work at defendant's rip-saw, by reason of improper machinery and appliances furnished by the defendant for the work, causing the death by a plank hurled from a running belt, the defense of contributory negligence was set up in bar, that the intestate was sawing, at the time of the injury, a board on the table, and before the board had gone through the saw he put another board in and negligently and carelessly sawed the second board and shoved it so that the first board caught in the saw and was thrown back, striking him on the head and causing his death, and against this the intestate had been warned: *Held*, an instruction to the jury was correct which, in effect, charged if they should find from the greater weight of the evidence that the intestate was injured in this manner, the plaintiff could not recover.

4. **Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Assumption of Risks.**

In an action for damages for the wrongful killing of plaintiff's intestate while at work at defendant's rip-saw, there was evidence tending to show that it was done by a plank falling upon and being thrown from an unguarded belt operating the saw, and that the machinery was old and obsolete: *Held*, a charge was correct, upon the application of the doctrine of assumption of risks, that if the jury find from the greater weight of the evidence that the conditions were such that only a reckless man would have continued to work thereunder, and the probabilities of being injured were greater than the probabilities of safety, the jury should answer the pertinent issue in the affirmative, in defendant's favor, for upon the facts in this case it could not be assumed as a matter of law.

APPEAL from *Lyon, J.,* at April Special Term, 1911, of ROWAN.

The action is brought to recover damages for the death of Odell Walker, alleged to have been caused by the negligence of the defendant. These issues were submitted:

1. Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate contribute to his own injury and death by his own negligence, as alleged in the answer? Answer: No.

3. Did plaintiff's intestate voluntarily assume the risks and dangers incident to and attendant upon the operation of the machinery, as alleged in the answer? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? Answer: $4,951.40.

The defendant appealed from the judgment rendered.

Theodore F. Kluttz & Son and R. Lee Wright for plaintiff.
Davis & Davis for defendant.

BROWN, J. There are a very large number of exceptions in the record that are made the basis of twenty-five assignments of error. It is impossible to discuss these assignments *seriatim* without going over much ground that has heretofore been covered by adjudications of this Court as well as unduly lengthening this opinion. Sixteen assignments of error relate to the admission of evidence. Upon a careful examination of them we find no substantial error, at least nothing that would justify us in granting a new trial.

The principal contention of the learned counsel for the defendant is based upon his 17th and 18th assignments of error, presenting the question as to the sufficiency of the evidence of negligence. The evidence introduced by the plaintiff, taken in its most favorable light, as it must be considered upon a motion to nonsuit, tends to prove that her intestate, Odell Walker, was employed by defendant in its manufacturing establishment at Kannapolis, and at time of his injury was operating a rip-saw, used for splitting boards as well as sawing them up in short pieces. The saw was operated by a belt which ran from the pulley operating the saw to another pulley, so that the belting was nearly horizontal with the saw and did not run perpendicularly to a pulley above or below the saw. The machine was operated by electric power overhead. There is evidence that this machine was very old, antiquated, "wobbly," and out of repair; that the table upon which the saw operated was of a disused and antiquated pattern; that the saw should have been operated on an adjustable table.

But the principal ground of negligence is that the belting was not cased and instead of running perpendicularly above or below to reach the power, it was horizontal and so placed that a plank was very liable to fall on it from the saw-table or elsewhere and be hurled against the operator, and plaintiff avers that her intestate was killed by a plank falling on this belt and striking him on the head with such force as to crush his skull and produce death.

There is evidence that rip-saws in general use are now run by a counter-shaft, and that if the power is above, the counter-shaft is below, and if power is beneath, the counter-shaft is underneath; that the saw always extends beyond the table, with counter-shaft hung above the ceiling. One belt runs the main-line pulley over counter-shaft; on that counter-shaft the pulley belt runs to that third pulley underneath saw-table. If power is underneath the house, counter-shaft is beneath also.

There is also some evidence to the effect that this being a horizontal belt running somewhat on a level with the saw, the belt should be cased so as to avoid the danger of objects falling on it and injuring the operator by being hurled against him.

It is now familiar learning that the employer of labor must furnish a reasonably safe place in which to do the work assigned—as reasonably safe as the nature of the business will admit. It is equally as well settled that where the employees are engaged in the operation of mills and other plants having machinery more or less complicated, and usually driven by mechanical power, in such case a standard of duty has been fixed and the employer is required to provide methods, implements, and appliances such as are known, approved, and in general use. *Bradley v. R. R.,* 144 N. C., 558; *Hicks v. Mfg. Co.,* 138 N. C., 319; *Horne v. Power Co.,* 141 N. C., 50; *Ferrington v. Tobacco Co.,* 141 N. C., 80; *Avery v. Lumber Co.,* 146 N. C., 592; *Shaw v. Mfg. Co.,* 146 N. C., 235; *Phillips v. Iron Works,* 146 N. C., 209. There is abundant evidence in the record that the machine used in this case was of "ancient lineage," possibly belonging to the ante-bellum days; that it was sadly out of order, "wobbly," and dangerous to operate.

In his able argument counsel for defendant did not undertake to defend the character of this machine, but contends with much ingenuity that the condition of the machine did not cause the injury; that the injury was the result of an accident unaccounted for in the evidence.

The evidence shows that according to present usage the belt should have been placed in a perpendicular position, or else, as it was nearly on a line with the saw, casing should have been put around it to prevent objects falling on it from being hurled against the operator. In answer to which it is contended that there is no evidence that the plank which crushed the intestate's skull was thrown from the belt.

This is undoubtedly a debatable question, as no witness saw it fall on the rapidly moving belt or strike the intestate. Yet that the plank struck the intestate must be admitted; that it struck his head with crushing force is demonstrated; that it could not have acquired such momentum from the ordinary passing of it over a rip-saw is evident. It is a fair inference that it must have been thrown from the belt, as it is hard to account for its force in any other manner. This is not a necessary inference, but a legitimate one from the circumstances of the case, and the jury seem to have taken that view.

We think, upon the question of proximate cause as well as negligence, his Honor's charge is a fair and clear presentation of the case to the jury.

We do not think the assignments of error in respect to the charge upon the second issue can be sustained.

The negligence set up in the answer is that while the intestate was sawing a board on the said table, and before the board had gone through the saw, he put another board into the saw and negligently and recklessly sawed said second board and shoved it forward until it knocked the first board which he was sawing onto the saw, causing it to be caught in the saw and thrown back, striking him in the head, and in this way was guilty of negligence which directly contributed to bring about the injury complained of.

His Honor charged upon this phase of the case that if the jury believe the evidence of the defendant's witness, Lyerly, that he instructed and warned the plaintiff's intestate not to put a second board into the saw until after he had completely sawed the first board, upon the ground that it was dangerous to do so, and the jury should find from the greater weight of the evidence that the plaintiff's intestate was injured in this manner, the plaintiff cannot recover in this case, and the jury will answer the second issue "Yes."

We do not see how the question of contributory negligence could have been put more fairly or clearly to the jury.

Upon the third issue, of assumption of risk, his Honor submitted the matter to the jury in as favorable a view for defendant as it could expect under the adjudications of this Court, when he charged, That if the jury find from the greater weight of the evidence that the condition of the machine at which the plaintiff's intestate (Odell Walker) was working at the time he was hurt was so defective and dangerous that only a reckless man would have worked at it, and that the probabilities of the plaintiff's intestate (Odell Walker) getting hurt were greater than the probabilities of his safety, the jury are instructed to answer the third issue "Yes."

The evidence that the intestate negligently continued to work on in the presence of a known and obvious danger, which should have deterred a man of ordinary prudence, is not so striking as to warrant the conclusion as matter of law that the intestate assumed the risk to such extent as to bar recovery.

Upon a careful review of the entire record we find no error that justifies us in directing another trial.

No error.

THE RED SPRINGS HOTEL COMPANY v. TOWN OF RED SPRINGS ET AL.

(Filed 22 November, 1911.)

1. **Bond Issues—Legislative Authority—Constitutional Law—Taxation.**

The requirement of the Constitution as to the calling and recording of the "aye" and "no" vote, having been met in all particulars relating to the issuance of bonds by the town of Red Springs for water and sewerage purposes, the validity of the issue can neither be successfully resisted nor the collection of taxes for the purpose restrained.

2. **Bond Issues—Legislative Authority—Necessaries—Vote of People.**

When it appears that a municipality, desiring to issue bonds for water and sewerage purposes, and a legislative enactment authorizing their issuance, have declared the purpose thereof to be a necessity, the validity of the bonds cannot be successfully attacked upon the ground that they were not duly authorized by a vote of the qualified voters of the town.

3. **Bond Issues — Legislative Authority — Municipal Authorities — Rate Taxed.**

An act of the Legislature authorizing a municipality to issue bonds for a water and sewerage system, allowing the boards of commissioners and of public works thereof to fix a rate of interest thereon of "not more than 6 per cent," when the bonds are issued. does not invalidate the issue because no rate of interest was fixed by the act.

4. **Bond Issues—Rate of Taxation—Sinking Fund—Constitutional Law.**

A bond issue of a town duly authorized by legislative enactment is not objectionable or invalid because at the present rate of taxation an insufficient revenue is obtained for a sinking fund to retire the bonds at maturity and to pay the interest thereon. *Lumberton v. Nuveen*, 144 N. C., 303, cited as controlling.

5. **Bond Issues—Water and Sewerage—Division of Proceeds—Municipal Discretion.**

A legislative grant of authority to a town to issue bonds for the purpose of providing a necessary waterworks and a necessary sewerage system, is not invalid because it provides for these two purposes in one bond issue, leaving the division of the proceeds for each purpose to the discretion of the municipal authorities, where it can be more intelligently exercised.

6. **Bond Issue—Sewerage and Water—Interpretation of Statutes.** The act of 1911, Public Laws, ch. 86, does not affect the validity of the bonds of Red Springs referred to in this case.

APPEAL from *Carter, J.,* at November Term, 1911, of ROBESON.

This is a controversy, without action, submitted to the court under the provisions of section 803 of the Revisal of 1905.

The board of commissioners of the town of Red Springs having declared by resolution that a system of waterworks and sewerage was an absolute and imperative public necessity for the town, an act was duly introduced in the Legislature of North Carolina, Session of 1911, authorizing said town to issue bonds to the amount of $35,000, bearing interest at a rate not exceeding 6 per cent, and maturing not later than thirty years from date of issue, and authorizing the levy of a special tax of 35 cents on the $100 valuation of property, and $1.05 on each taxable poll to pay interest and provide a sinking fund for the retirement of said bonds at maturity. This act was passed by the General Assembly of North Carolina, and appears as chapter 170, Private Laws of North Carolina, Session of 1911. A board of public works for the town of Red Springs was created by said act to handle the funds and to perform certain other duties therein specified.

The board of public works of said town first advertised the issue at 5½ per cent interest, and bonds bearing interest at this rate were advertised and sold. The purchaser failed to comply with his bid, and thereupon bonds bearing interest at 6 per cent have been advertised and contracted to be sold. It is admitted that unless the defendants are restrained they will proceed to sell the bonds and levy the special tax as provided by said act of 1911.

The plaintiff is a corporation owning property in the town, and brought this action to restrain the issue of the bonds and the collection of the tax.

The cause was heard before his Honor, *Frank Carter, J.,* at November Term, 1911, of the Superior Court of Robeson County, and from a judgment in favor of the defendants the plaintiff excepted and appealed to this Court.

McIntyre, Lawrence & Proctor for plaintiff.
McLean, Varser & McLean for defendants.

BROWN, J. The plaintiff bases its claim for injunctive relief upon five propositions:

1. That chapter 170 of the Private Laws of North Carolina, Session of 1911, was not enacted by the General Assembly in accordance with the provisions of the Constitution of North Carolina, and hence the town of Red Springs has no legal authority to issue said bonds or to collect any tax whatever on account thereof.

This contention cannot be sustained. A transcript of the entries upon the journals of both Houses of the General Assembly are set out in the record and show that the "ayes" and "noes" were duly called and entered and the bill enacted into law in strict accordance with the Constitution.

2. That the town of Red Springs has no power to issue said bonds or to collect any tax whatever on account thereof, for that said bonds were not authorized by a vote of the qualified voters.

The purpose of the bonds is to secure for the municipality a system of waterworks and sewerage. This is declared by the Legislature in the preamble to the act to be a necessary expense, as well as by the municipal authorities. The question has also been repeatedly decided by this Court adversely to plaintiff's contention. *Faucett v. Mount Airy,* 134 N. C., 125; *Davis v. Fremont,* 135 N. C., 538; *Hightower v. Raleigh,* 150 N. C., 569; *Water Co. v. Trustees,* 151 N. C., 175; *Bradshaw v. High Point,* 151 N. C., 517; *Underwood v. Asheboro,* 152 N. C., 641.

3. That chapter 170 of the Private Laws of North Carolina, Session 1911, does not definitely fix the rate of interest to be borne by said bonds, but leaves the rate of interest to the discretion of the board of commissioners and board of public works of said town, and hence said act is null and void and no authority is conferred upon the town of Red Springs to issue said bonds or to levy any tax on account thereof.

This contention cannot be sustained. The purpose of the Legislature in providing that the bonds should bear interest at a rate of "not more than 6 per cent" was to give the town authorities discretion to sell the bonds to bear a rate of interest most advantageous to the town, not exceeding, in any event, 6 per cent.

By section 5 of the act above referred to, discretion is given to the board of public works and board of commissioners of the town to fix the rate when the bonds are sold, not exceeding 6 per cent.

The point is expressly decided in *Lumberton v. Nuveen*, 144 N. C., 303.

4. That the rate of tax to be levied to pay principal and interest on said bonds upon the valuation of property in the town of Red Springs as now constituted is not a sufficient special tax to provide for the payment of principal and interest at maturity, and for that the defendants have no power to levy any larger tax than 35 cents on the $100 valuation of property and $1.05 on each taxable poll, this being the rate of special tax provided in the act authorizing the issue of said bonds.

The same point was presented and decided by this Court in *Lumberton v. Nuveen*, 144 N. C., 303, wherein it is said: "It is contended that the rate of taxation levied by the plaintiff's commissioners in their orders will be insufficient to pay the annual interest and to provide a sinking fund. This cannot invalidate the legality of the bond issue." *Underwood v. Asheboro, supra; Jones v. New Bern,* 152 N. C., 64. In the latter case this Court said: "The alleged failure to provide a sinking fund for payment of principal or special tax for payment of interest does not affect the legality of the bonds, but only the means and methods of payment."

The Legislature can, and doubtless will, if necessary, authorize an increase in the tax rate, or that may be unnecessary owing to the growth of the town and increase in taxable property. It is well known that Red Springs is a growing town and inhabited by a remarkably thrifty, industrious, and high-class citizenship. Doubtless in a short time a fair valuation of the property at the rate authorized by the Legislature will yield ample income to meet the provision for both interest and sinking fund.

5. That bonds for the creation of a system of waterworks and bonds for the creation of a system of sewerage are to be issued for two distinct and separate objects, and for that bonds to provide funds for both purposes cannot be issued in one series and part of the proceeds used for waterworks and another part for sewerage; and for that two purposes are joined in one issue of bonds, and that this cannot be done, especially in view of the fact that there is no method or proportion to be followed in the division of the funds between the two objects.

Of necessity, the division of the proceeds of the sale of the bonds between sewerage and waterworks must be left to the discretion of the municipal authorities, as the one may cost more than the other, and the exact cost of each could not be well determined by the Legislature.

The point is decided in the *Nuveen case, supra.* Our judgment is that the bonds are a valid obligation of the defendant town.

Our attention has been called to act of the General Assembly of 1911, Public Laws, ch. 86. That act is a public law intended to give all cities and towns, without further legislation, power to issue bonds for the purposes therein named when approved by a majority of the qualified voters. It was ratified 4 March, 1911, and the act amending the Red Springs charter was ratified 27 February, 1911. The latter is a private act and well within the power of the General Assembly to enact. We have held that in respect to issuing bonds for *necessary expenses* the General Assembly may require the approval of a majority of the qualified voters, and also it may, by special acts, as in this case, not require it.

We are of opinion that the act of Assembly, chapter 86, Public Laws 1911, does not affect the powers conferred by the amendment to the charter of Red Springs, Private Laws 1911, ch. 170.

The judgment of the Superior Court is

Affirmed.

SAVANNAH SEXTON, ADMINISTRATRIX OF U. E. SEXTON, v. THE GREENSBORO LIFE INSURANCE COMPANY.

(Filed 22 November, 1911.)

1. **Insurance — Premiums — Notes — Extension — Parol Evidence— Payment.**

   When upon its face in express terms a note given by an insurer for a premium due on his life insurance policy declares that the policy is void if the note be not paid when due, the position is not available that the note was given for the payment of the premium and not for an extension of time within which to pay it.

2. **Insurance — Premiums — Receipts — Possession—Payment—Evidence.**

   When a note is given for a premium due on a life insurance policy and attached to it is a paper-writing purporting to be a receipt for the premium, the paper-writing attached to the note is not evidence that the note was given and received as a payment of the premium, when it is undelivered and in the possession of the insurance company, and produced at the trial upon legal notice to do so.

APPEAL from *Lyon, J.*, at April Term, 1911, of DAVIDSON.

Civil action to recover on a policy of life insurance issued by the defendant on the life of U. E. Sexton. The policy is for $1,000, numbered 742, with an accident clause requiring the insurer to pay double the amount in the event of death by external, violent, and accidental means. The insured was killed in a railway wreck 15 December, 1909.

These issues were submitted to the jury, to which defendant excepted and tendered other issues:

1. Did the defendant issue and deliver to the plaintiff's intestate the policy No. 742 sued on? Answer: Yes.

2. Is U. E. Sexton dead, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff's intestate pay or cause to be paid the annual premiums required and within the time stipulated by the policy? Answer: Yes.

4. Did said policy lapse, as alleged in the answer? Answer: No.

5. What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,000, less $60, with interest from date of note.

The following issues were tendered by the defendant:

1. Did the defendant issue and deliver to the plaintiff the policy No. 742 sued on?

2. Did the plaintiff's intestate die on the 15th day of December, 1909, as alleged in the complaint?

3. Did the defendant accept in settlement of the premium of $34.57 due 1 August. 1909, a cash payment and the intestate's note for $18.17, dated August, 1909, and due 1 November, 1909?

4. If such note was given, was it paid at maturity?

5. What sum, if anything, is the plaintiff entitled to recover?

The court rendered judgment for plaintiff, and defendant appealed.

E. E. Raper and McCrary & McCrary for plaintiff.
Walser & Walser and King & Kimball for defendant.

BROWN, J. In respect to the issues, we are of opinion that under those submitted by the court every defense can be presented, but as the case is to be tried again it is well to say that those tendered by the defendant present rather more directly to the minds of the jury the real fact in controversy.

The controversy is over the payment of the premium due 1 August, 1909, of $34.57. If that was paid, the plaintiff is entitled to recover. If it was not paid or payment waived, plaintiff is not entitled to recover.

The evidence shows that on 2 September, 1909, the insured paid in cash on this premium $16.40 and gave his note for $18.70, of which the following is a copy, dated the day the premium became due:

$18.17 August 1, 1909.

Ninety days after date, for value received, I promise to pay to the order of Greensboro Life Insurance Company eighteen and 17/100 dollars, without discount or defalcation, with interest at 6 per cent per annum, at................, being the premium due 1 August, 1909, on policy No. 742 in said company. Should this note, with interest, not be paid when due,

said policy shall immediately become null and void without notice, subject to the nonforfeiture provisions contained in the policy, and in that event any money paid on account of premium for which this note is given shall become the property of the company. U. E. SEXTON.
Signature of Person Insured.

Denton, N. C.

His Honor charged the jury as copied from the record: "Now, as I told you, by consent you will answer the first and second issues 'Yes.' Now, as to the third issue, 'Did the defendant accept in settlement of the premium of $34.57 due 1 August, 1909, a cash payment and the intestate's note for $18.17, dated August, 1909, and due 1 November, 1909?' The only premium that is in controversy is the premium that was payable on 1 August, 1909. Now, you find the facts from the evidence, and if you find from the evidence that the intestate, U. E. Sexton, paid the premium by giving his note and cash accompanying the note, and that the company accepted that as a payment on the premium, not conditionally, but accepted it as a payment of the annual premium, then it would be your duty to answer that issue 'Yes'; but if you find from the evidence that the note and part of the premium due 1 August, 1909, was not accepted and treated by the company as a payment, and you find that that note was never paid at all after the death of the intestate, or before his death, why you should answer that issue 'No.' "

There are two objections to that charge, both of which must be sustained. There was no such issue submitted to the jury as the one recited in the charge as the third issue. That is the third issue tendered by the defendant, and which was refused. There must be some mistake in printing this record, or in copying the charge of his Honor, for the record does not disclose that the third issue tendered by defendant was ever substituted for the other. But the chief and most important exception is that there is no evidence that the defendant accepted the note as a payment of the premium. It is merely an extension of the time of payment. In express terms the note on its face declares that the policy is void if the note is not paid when due.

This note is similar to the one construed in *Ferebee v. Insurance Co.,* 68 N. C., 11.

Cooley says: "It is commonly stipulated by insurance companies that if a note is accepted for a premium, a failure to pay the note at maturity shall terminate the insurance. When the policy, or the policy and the note, contained a stipulation to this effect, a failure to pay at maturity a note given for a premium will work a forfeiture of insurance." Cooley's Briefs on Insurance, vol. 3, p. 2269, and cases cited; *Pitt v. Insurance Co.,* 100 Mass., 500.

The plaintiff was permitted to introduce this receipt in evidence as Exhibit "C":

GREENSBORO LIFE INSURANCE COMPANY,
GREENSBORO, N. C., 13 September, 1909.

Received from the holder of policy No. 742, issued by this company on the life of Ulysses E. Sexton, $34.57, being the annual premium due 1 August, 1909.

Premiums are payable at the home office, but may be paid to an authorized agent in exchange for an official receipt countersigned by that agent. Otherwise no receipt will be binding.

Countersigned by C. SCARBOROUGH. JULIAN PRICE,
Secretary.

On the reverse side of the said Exhibit "C" is the indorsement:

Pay to the order of Shuford National Bank, Newton, N. C.
(Signed) GREENSBORO LIFE INSURANCE COMPANY,
W. E. ALLEN, *President.*

The defendant in apt time objected to the introduction of paper-writing called Exhibit "C," purporting to be receipt for premium on said policy, for that the said receipt was never delivered to the plaintiff's intestate, but was produced by the defendant at the trial in open court in response to notice, having been retained by the defendant and attached to the intestate's note for above premium.

Objection overruled; exception by defendant. The exception must be sustained. This receipt was pinned to the aforesaid note, evidently ready for delivery whenever the note should be paid. It was in defendant's possession and produced in court by it by order of the judge, and was introduced by plaintiff as evidence of payment of the premium.

Had the receipt been in the plaintiff's possession it would be very strong evidence of payment; but as it was in defendant's possession and had never been delivered, it is no evidence of payment and the introduction of it as evidence by the plaintiff under the circumstances was inadmissible.

New trial.

JAMES F. HORTON v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 22 November, 1911.)

1. **Railroads — Interstate Commerce — Master and Servant—Intrastate Cars—Federal Employer's Liability Act.**

   A locomotive engineer on a train which carries interstate cars is engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, though there are intrastate cars in the train.

2. **Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.**

   When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions.

3. **Railroads — Master and Servant — Defective Appliances—Negligence—Evidence.**

   When there is evidence tending to show that the eye of the engineer of the defendant railroad company was injured by an explosion of the water-glass in the cab of his locomotive, while in the discharge of his duties, and that the injury could not have happened had the defendant, after notice, supplied the water-glass with the usual shield or guard in general use by railroad companies, it is sufficient upon the question of defendant's negligence.

4. **Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.**

When a plaintiff has sued in the State court and has pleaded and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act.

APPEAL by plaintiff from *Whedbee, J.*, at April Term, 1911, of WAKE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Douglass, Lyon & Douglass and Holding & Snow for plaintiff.

Murray Allen for defendant.

CLARK, C. J. This is an action to recover damages for injury to one of plaintiff's eyes caused by the bursting of a defective water-glass on a locomotive engine which plaintiff, as engineer, was operating on defendant's railroad. Plaintiff alleges that he was injured while he and the defendant were engaged in interstate commerce, and brought this action under the Federal Employer's Liability Act of Congress, 22 April, 1908. The parts of said act material to this action are as follows:

"SEC. 2. Every common carrier by railroad engaging in commerce between any of the several States shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, *or by reason of any defect or insufficiency, due to its negligence,* in its engines, appliances, machinery, etc.

"SEC. 3. In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"SEC. 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

The plaintiff testified that he had, in the train, cars of several railroads located beyond the State boundary, and some of them were lumber cars destined for Richmond, Suffolk, Portsmouth, Norfolk, and Franklin, Va., and Pittsburg, Pa. In *Johnson v. R. R.*, 178 Fed., 643, it was held that an employee of a railroad company charged with the duty of seeing to the coupling of cars some of which were being used in interstate commerce was employed in interstate commerce within the provisions of the Employer's Liability Act. The same was held as to a section-hand working on the track of a railroad over which both interstate and intrastate traffic is moved. *Zikos v. R. R.*, 179 Fed., 893.

In a very recent case decided by the United States Supreme Court, 30 October, 1911, *R. R. v. United States*, it was held that when the defendant railroad company was operating a railroad which was "a part of a through highway over which traffic was continually being moved from one State to another," hauled over a part of its road five cars, the couplers of which were defective, two of the cars being used at the time in moving interstate traffic and the other three in moving intrastate traffic, though the use of the last three was not in connection with any car or cars used in interstate commerce, yet the Federal Safety statute applied to said three cars and the defendant was liable to the penalty for not having automatic couplers thereon, because the act applies "to any railroad engaged in interstate commerce." Applying that decision to this case, it is very certain that, for a stronger reason, the plaintiff was entitled to bring this action under the Federal statute. He was at the time engaged in hauling cars which were being used in interstate commerce.

The engine on which the plaintiff was placed by the defendant was equipped with a "Buckeye water-glass," without a shield or guard. The plaintiff testified that "While he was in the discharge of his duty, and without any act on his part and without his fault, the defective water-glass exploded and injured his eye. . . . That if the water-glass had been supplied with a shield or guard, the glass would not have struck his eye when the tube exploded. . . . And that water-glasses of the character of the Buckner glass are in general and accepted use by the railroad companies operating in this country."

Pusey, a witness for plaintiff, testified: "If the shield is left off . . . when the inner tube breaks, the glass will fly, but it cannot fly out in front of the shield. . . . It is the duty of the inspectors to examine the engine and report all defects. It was the duty of the inspectors at Raleigh to ascertain and report the defects in this water-glass." The plaintiff also further testified "that on his return from his first trip with the defective water-glass he applied to Matthews, the foreman, for a shield or guard, and was informed by him that the company had none; that they were put on at Portsmouth." The plaintiff then arranged to have one made himself, but before it was done the glass exploded and for lack of the shield his eye was injured.

The plaintiff was furnished with a defective and dangerous appliance. This constituted negligence on the part of the defendant. Whether the plaintiff was guilty of contributory negligence or not, it is immaterial to consider, for this statute provides that in such actions as this "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employees."

In *Owens v. R. R.*, 88 N. C., 502, two of the three judges then constituting the Court held that in an action by an employee against a railroad company for personal injuries sustained by its negligence the burden was upon the plaintiff to negative contributory negligence on his part; *Mr. Justice Ruffin* dissenting. Thereupon the Legislature promptly enacted chapter 33, Laws 1887, now Rev., 483, which required the defendant in such cases to "set up in the answer and prove on the trial" contributory negligence as a defense. As the court cannot logically direct a nonsuit when the burden of proof is upon the defendant (*Spruill v. Insurance Co.*, 120 N. C., 141, and cases citing it in Anno. Ed.), the intent of the statute was evident. This Court, however, in *Neal v. R. R.*, 126 N. C., 634, held by a divided Court (two judges dissenting) that notwithstanding the statute, the court in such case upon a demurrer to the plaintiff's evidence could direct a nonsuit.

The act of Congress of 1908 clearly forbids a nonsuit to be entered in any case where there is any evidence of negligence on the part of the defendant. As under the statute the plaintiff can elect to sue in the State court, he has naturally chosen to bring his action under the provisions of the Federal statute. Doubtless the next Legislature will make similar provision in this State.

All that it is necessary for us to say in this case is that the plaintiff was engaged in interstate commerce at the time of his injury; that there was evidence of negligence on the part of the defendant; that the plaintiff could elect to sue in the State court, specifying in his complaint, as he does, that he invokes the protection of the Federal statute, and that under its terms the court is forbidden to direct a nonsuit upon the ground that there is evidence of contributory negligence shown by the plaintiff's testimony, because the statute provides that though the plaintiff may have been guilty of contributory negligence, it shall not bar a recovery.

In directing a nonsuit, therefore, the judge was guilty of

Error.

ROBERT PHIFER v. COMMISSIONERS OF CABARRUS COUNTY.

(Filed 22 November, 1911.)

1. **Condemnation—Damages—Special Benefits—Offsets.**

In awarding damages against a county for constructing a public road over private property, the owner is compensated for the taking of the property for public use when the benefits he will receive are equal to the value of the land taken.

2. Same — Legislative Authority — Vested Rights — Constitutional Law.

The Legislature has the constitutional authority to provide that the special benefits to be derived to the owner of lands over which a county constructs a public road shall be an offset against damages sustained by the owner in having his lands thus taken for public use; and this requirement can be changed by the Legislature at any time before the rights of the parties are settled and vested by verdict and judgment.

3. Condemnation—Damages—Special Benefits—Offsets.

Only those benefits which are special to the owner of lands taken by the county in constructing a public road across them can be considered as an offset to the damages claimed by him, and not such as he shares with other persons in similar circumstances, unless the statute provides differently.

4. Same—Speculative Damages—Evidence.

In this action against the county for damages to plaintiff for taking his lands in the construction of a road across them, evidence was competent that the value of the lands would be increased because of the special benefits thus to be derived by the owner, and not objectionable as being speculative or remote.

5. Instructions, Correct in Part—Appeal and Error.

A prayer for special instruction which in part correctly states a proposition of law, and incorrectly applies them to the matters in evidence, is improper, and should be refused.

BROWN and WALKER, JJ., dissenting.

APPEAL by plaintiff from *Biggs, J.*, at May Term, 1911, of CABARRUS.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Montgomery & Crowell for plaintiff.
L. T. Hartsell and H. S. Williams for defendant.

CLARK, C. J. This proceeding was begun before the clerk to assess the damages caused to plaintiff's lands by opening a public road through them, and was tried on appeal in the Superior Court.

The plaintiff owned about sixty acres of land about three-fourths of a mile from the town of Concord. There were already two public roads through it before the defendant built this road. There is no exception except to the refusal of two prayers to instruct the jury and one for an instruction given—all three in reference to the nature of the special benefits to which his Honor told the jury that they must restrict the deductions to be made from the damages which they might find the defendant's land had sustained. The jury found in response to the only issue submitted that the damages sustained to the land by reason of the road being laid out over it were not greater than the benefits which the plaintiff had received therefrom.

In *Miller v. Asheville,* 112 N. C., 768, the Court said: "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has constitutional and vested right. The Legislature in conferring upon the corporation the exercise of the right of eminent domain can, in its discretion, require all the benefits, or a specified part of them or forbid any of them, to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled and vested by a verdict and judgment."

But in *Bost v. Cabarrus,* 152 N. C., 536, the Court held that the statute now before the Court was different from that in *Miller v. Asheville,* and that the general rule in condemnation proceedings applied. The judge therefore properly charged the jury that they should "deduct from the damages only those benefits which are special to the owner and not such as he shares in common with other persons in similar circumstances." But in fact there was no evidence of benefits to the land which was common to others similarly situated. There were no others similarly situated.

The first prayer for instruction was: "The jury in considering the special benefits are not permitted to consider the evidence that the land is near town and may be cut into small lots of 100 feet front and sold, because that is not evidence of special or peculiar benefits contemplated by the statute which is not common to others similarly situated." This was properly refused. This was a special benefit to this particular land, not common to the neighborhood, because the road made a front on each side which would enable the plaintiff to sell lots, a benefit which would not accrue to land in the neighborhood off the road. Besides, evidence to the above effect had been introduced by both parties without objection.

The second prayer was to instruct the jury "that the fact that said property could be cut into lots and sold is what the law calls speculative benefits, which may or may not accrue to the owner, and the jury will not consider any speculative benefits or damages in this case." The last paragraph of the prayer was correct, but the court was not required to give it, since the instruction asked, as a whole, was faulty. The fact that property could be cut into lots and sold was in evidence and a proper matter for consideration by the jury in estimating the benefits accruing to the plaintiff. This was not speculative, but practical.

The last exception is because the judge in arraying the contentions of the parties recited a contention of defendant's counsel which he had made to the jury without objection on the part of the plaintiff. It is too late to object to it after verdict. *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 635.

No error.

BROWN, J., dissenting: I am of opinion that the benefits permitted to be considered by the jury as inuring to plaintiff's land are entirely too remote and speculative. His land is occupied by the plaintiff as a residence and is situated some three-fourths of a mile beyond the boundaries of Concord and is on two public roads. The third road that has been cut through it takes six acres of it. The possibility of the plaintiff being able to cut up his property and sell it off in town lots is problematical and entirely too remote to be considered.

Again, I think the benefits that should be considered are those which naturally accrue to the land in the condition it is in and the uses to which the owner puts it. I don't think the plaintiff should be compelled to sell his home in order to endeavor to realize these highly uncertain profits from sale of town lots.

MR. JUSTICE WALKER concurs in this opinion.

FULP & LINVILLE ET AL. v. KERNERSVILLE LIGHT AND POWER COMPANY.

(Filed 22 November, 1911.)

Liens—Material Men—Identity of Property—Interpretation of Statutes.

A line of poles, wires, and appliances carrying electricity from a dynamo to a manufacturing plant for power and lighting purposes retains its identity and therefore is not "material furnished" within the meaning of Revisal, 2016, so as to entitle the vendor to a lien upon the plant, for in such instances the vendor could retain title under a conditional sale or by a mortgage lien which would protect his debt. *Pipe Co. v. Howland*, 111 N. C., 615, cited and distinguished.

WALKER, J., dissenting.

APPEAL from *Lyon, J.*, at September Term, 1911, of FORSYTH. Appeal by Baltimore Supply Company.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

L. M. Swink for appellant.
T. C. Hoyle and F. P. Hobgood, Jr., for appellee.

CLARK, C. J. The Baltimore Supply Company furnished the defendant for its light and power plant material consisting of insulators, wires, cross-arms, transformers, locust pins, oak brackets, and other electrical supplies and equipments. The wires furnished were attached to the dynamo, but were blown down, disconnected, rolled up, and are now in the possession of the receiver in this action, which is a creditor's bill.

The appellant properly itemized its claim and filed the same, but the appellee denies that the materials are such as entitle the Baltimore Supply Company to obtain a lien under the statute, because the materials sold were not put in the plant of the Light and Power Company so as to lose their identity, but were articles which did not become a part of the building or realty, and hence were not "materials furnished" in contemplation of Revisal, 2016.

The referee found as a fact that the transformers and wire were strung on the electric light poles and that the oak brackets, locust pins, cross-arms, and other items are not shown to have become any part of the building, and held that such material did not come within the meaning and intent of the statute. This finding of fact and conclusion of law were approved by the judge. In this we find no error. *James v. Lumber Co.,* 122 N. C., 157; *Electric Co. v. Power Co., ib.,* 599. Both these cases, it is true, were under Code, 1255, now Revisal, 1131. The word "material" has been stricken out of this last section, but the construction placed upon it while it was in that section is applicable to the same word in Revisal, 2016.

In *James v. Lumber Co., supra,* it was said in the concurring opinion: "This is the test: where the material furnished to keep the business going is something that is consumed in the use, as coal, for instance, or labor performed, or a tort committed, which is intangible and unmortgageable, or is such material as goes into and makes part of the realty or the product in such a way as to be indistinguishable from the mass, as timber put into a building or cotton that is manufactured, these things come within the purview of the remedy provided by The Code, sec. 1255; but where the subject-matter for which the debt is incurred keeps its identity, as an engine, even though built into the wall, this section does not apply, because the party had his remedy by retaining title or taking a mortgage on the property sold."

In *Electric Co. v. Power Co.,* 122 N. C., 599, the above was approved, the Court saying that articles perfect in themselves and not put into a building so as to lose their identity would not constitute "material" upon which the seller would have priority over mortgage bonds, since the seller could "protect himself by retaining title, as by conditional sale or by taking a mortgage on the property sold."

The reasoning in the above cases, though upon a different section of the Revisal, applies to this. In *Pipe and Foundry Co. v. Howland*, 111 N. C., 615, relied on by the appellant, the point decided was that the property of a corporation chartered for supplying water to a city is subject to a lien for materials furnished. It was admitted that the claim was sufficient in its form and in its nature to make it a lien, and the question whether the "materials furnished" were such for which a lien would lie was not before the Court.

The judgment is
Affirmed.

WALKER, J., dissents.

VAUGHAN & BARNES AND MOSELEY BROTHERS v. J. R. DAVENPORT.

(Filed 22 November, 1911.)

Parties — Contracts — Assignment — Persons Interested — Interpretation of Statutes.

The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence that he has assigned the contract to a third person, not a party to the action, and has no further interest therein. Revisal, sec. 400.

APPEAL by defendant from Ferguson, J., at March Term, 1911, of PITT.

Jacob Battle and Moore & Long for plaintiffs.
Aycock & Winston and F. L. James & Son for defendant.

CLARK, C. J. In 1900 the defendant entered into a contract with Moseley Brothers to deliver to them 100 bales of merchantable cotton at the warehouse in Pactolus under the terms of the contract which is set out in the record. Thereafter

Moseley Brothers transferred and assigned the contract to Vaughan & Barnes. This action is brought by them jointly to recover damages by reason of the failure of the defendant to comply with this contract.

The plaintiffs put in evidence a letter from Vaughan & Barnes, dated 22 November, 1909, in which they notified the defendant that they had sold said cotton to Messrs. Hogan & Co., cotton buyers and exporters, and added: "We want to know by return mail what you propose to do in order that we may be able to tell the buyer here when he may expect delivery of this 100 bales of cotton in question." There was no evidence offered to show that the cotton had been resold to the plaintiffs.

The motion of the defendant for nonsuit should have been granted on the ground that "the evidence disclosed that the plaintiffs were not the owners of the claim sued on." *Chapman v. McLawhorn,* 150 N. C., 166, and numerous cases there cited. Revisal, 400, is explicit: "Every action must be prosecuted in the name of the real party in interest." The plaintiff's evidence showed that the right to demand this cotton or damages for its nondelivery had passed to Hogan & Co. by their assignment prior to the date when it was deliverable. The plaintiffs are neither legal nor equitable owners of the contract, nor are they trustees of an express trust.

They have "sawed the limb off between themselves and the tree."

Action dismissed.

FULP & LINVILLE ET AL. v. KERNERSVILLE LIGHT AND POWER COMPANY.

(Filed 22 November, 1911.)

1. **Equity — Creditor's Bill — Liens — Amount of Claim — Superior Court's Jurisdiction—Justice's Courts.**

The Superior Court having taken charge of the debtor's property in a creditor's bill under its general jurisdiction, may collect and dispose of all the assets and determine the liens and priorities and make application accordingly of the funds, irrespective of the amount of any claim, including liens for labor and material less than $200, of which otherwise the court of a justice of the peace would have jurisdiction.

2. **Liens—Material and Labor—Clerk—Notice—Record Sufficient.**

The purpose of filing mechanic's, etc., claims for liens, Revisal, sec. 2026, is to give public notice of the claims, the amount, the material supplied or the labor done and when done, on what property, specified with such detail as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached.

3. **Same—Schedule Referred to.**

When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with the statute. Revisal, secs. 915 (21), 2026.

4. **Liens—Conditional Sale—Reservation of Title—Realty—Registration.**

Goods sold under a contract reserving title in the vendor, which are attached to the realty, become realty except as between the parties, but not as against others who have acquired a lien for labor and material before the registration of the conditional sale.

APPEAL by Greensboro Supply Company from *Carter, J.*, at November Term, 1911, of ROBESON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Manly, Hendren & Womble for Crawford Plumbing and Mill Supply Company.

T. C. Hoyle and F. P. Hobgood, Jr., for appellant.

D. H. Blair for Fulp & Linville and Kernersville Manufacturing Company.

CLARK, C. J. This was a creditor's bill brought by the plaintiffs, Fulp & Linville, on behalf of themselves and all other creditors of the Kernersville Light and Power Company, which had built a power plant, intending to furnish that town with electric power. It bought from the Greensboro Supply Company certain property, among which was a dynamo, boiler, and engine, and the necessary pipes to connect said boiler and engine with the plant. The contract under which this property was bought was dated 21 June, 1909, and title was retained by the Greensboro Supply Company till full payment. This contract was not recorded, however, till 7 September, 1909. On 10 August, 1909, the Greensboro Supply Company sold the defendant a deep-well pump and other fixtures, retaining title thereto, but this contract was not recorded till 27 October, 1909.

From 3 July to 10 September, 1908, the Kernersville Furniture Manufacturing Company and Fulp & Fulp furnished material which was used in the construction of the building to an amount less than $200 to each, and attempted to docket that lien in the clerk's office, but the appellants claim that they failed to do so because the claims upon which the lien was based were not itemized and set out in detail upon the lien docket of the clerk. From 5 July to 4 September, 1909, Fulp & Linville also furnished materials which were used in constructing the building of defendant company, and the Crawford Plumbing Company furnished labor which was performed upon the said building, each in an amount of less than $200, and docketed their liens in the clerk's office within the time required by the statute.

On 9 September, 1909, W. H. Clinard obtained judgments before a justice against the defendant aggregating $677.82, which he docketed on the same day in the office of the clerk of the Superior Court. These judgments were on 24 January, 1910, transferred to the plaintiff, Mary Lou Sapp. The appeal of the Greensboro Supply Company presents three grounds of exception:

1. "That the mechanic lienors, Fulp & Linville, Kernersville Furniture Manufacturing Company, Fulp & Fulp, and the Crawford Plumbing Company, cannot enforce their liens in this action in the Superior Court because each of the amounts is less than $200."

But the Superior Court having taken charge of the entire property under its general jurisdiction by means of a creditors' bill, has jurisdiction to collect and dispose of all the assets and to determine the liens and priorities and to make application accordingly of the funds, irrespective of the amount of any claim. *Albright v. Albright,* 88 N. C., 238; *Long v. Bank,* 85 N. C., 356. If any creditor in such case should institute an independent action he would be enjoined and forced to seek his remedy in the creditors' bill. *Dobson v. Simonton,* 93 N. C., 270. The very purpose of the creditors' bill is to "discharge a multiplicity of suits and prevent a costly scramble among creditors." *Wadsworth v. Davis,* 63 N. C., 253.

2. "That the mechanic lienors, the Kernersville Furniture Manufacturing Company and Fulp & Fulp, even if the Superior Court had jurisdiction in this action, failed to file a valid lien, because the notice of the lien filed does not specify in detail the materials furnished and the time thereof."

The purpose of the statute is to give public notice of the plaintiff's claim, the amount of it, the material supplied, or the labor done and when done, on what property, specified with such detail as will give reasonable notice to all persons of the character of the claim and the property on which the lien attached. *Cook v. Cobb,* 101 N. C., 70.

The notice of lien here filed by the parties is not recorded as fully as it might be, but we think is in substantial compliance with Revisal, 2026; *Cameron v. Lumber Co.,* 118 N. C., 266. The clerk recorded the notice, giving each bill with its date and amount, which together made the amount of the lienor's claims, without specifying the articles and the price of each.

Revisal, 915 (21), requires that the clerk shall keep "a lien docket, which shall contain a record of all notices of lien filed in his office, properly indexed, showing the names of the lienor and lienee." The part of the notice which the clerk did enter on his docket in each of these instances shows the names of the lienor and lienee, the amount claimed by each, an accurate description of the property by metes and bounds, the dates between which the material was furnished, and refers to "the schedule of prices and material" attached to the notice, and asks that it "be taken as a part of this notice of lien." The appellants admit that this schedule contained a full itemized statement in detail of the material furnished and that it went into the construction of the building.

3. The last objection of the Supply Company is that the appellant having retained title to the boiler, engine, pump, dynamo, etc., by a written instrument duly recorded, is entitled to possession of said articles freed from the liens of any one."

But for the reservation of title the above articles were clearly fixtures, and consequently realty. *Horne v. Smith,* 105 N. C., 322. By virtue of the agreement of the parties and the retention of the title, they remained personalty as between the parties. But as to these lienors, the retention of title was not operative, because the contract was not recorded till the work and labor were done and the material furnished out of which these liens arose. *Clark v. Hill,* 117 N. C., 11. There being no retention of title recorded, the parties furnishing material and labor had a right to rely upon the apparent character of such property as realty. The liens of the appellees are valid for the furnishing of any material prior to the date when the conditional sale of the articles furnished by the Greensboro Supply Company was recorded.

The judgment of Clinard was a lien on the realty from the date of its docketing, 9 September, 1909. It is therefore not a lien upon the boiler, engine, etc., as to which the contract retaining title was docketed 7 September, 1909.

As thus modified, the judgment in the appeal by the Greensboro Supply Company is affirmed.

Modified and affirmed.

F. M. ELLETT v. ELIZABETH B. ELLETT.

(Filed 22 November, 1911.)

1. **Divorce, Absolute—Adultery of Wife—Burden of Proof—Actions at Law.**

While in certain instances of an equitable nature there is a requirement that the proof be "clear, strong, and convincing," and in criminal cases the State must prove its charge "beyond a reasonable doubt," this intensity of proof is not required in an action for absolute divorce brought by the husband on the ground of the wife's adultery, the action being one at law and only requiring proof of the act by the preponderance of the evidence.

2. **Divorce, Absolute—Adultery of Wife—Abandonment by Husband—Harmless Error—Instructions.**

In an action for absolute divorce brought by the husband on the ground of the wife's adultery, a finding by the jury that before the time of the adultery the plaintiff had maliciously turned his wife out of doors, does not render harmless an instruction erroneously imposing upon the plaintiff the burden of showing the act of the wife's adultery by "clear, strong, and convincing proof."

3. **Divorce, Absolute—Wife's Adultery—Abandonment—Interpretation of Statutes.**

Under our statutes, under certain conditions, an agreement for separation executed by the husband and wife is valid (Revisal, sec. 2116); and when abandoned by her husband, the wife may sue for support of herself and children without seeking a divorce (Revisal, sec. 1292). Hence, the doctrine laid down by our older decisions does not in reason apply, which rendered the adulterous conduct of the wife after abandonment no ground for divorce, especially, as in this case, where the husband under an agreement of separation was supporting his wife at the time of her alleged acts of adultery.

Appeal by plaintiff from *W. J. Adams, J.*, at February Term, 1911, of Rockingham.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

F. L. Fuller, C. O. McMichael, A. D. Ivie, and W. P. Bynum for plaintiff.

A. L. Brooks for defendant.

Clark, C. J. This is an action for an absolute divorce brought by the husband against the wife. The seventh issue was as follows: "7. Did the defendant commit adultery with one George B. Gatling, as alleged in the complaint?" On this issue the judge charged: "The plaintiff must show such adulterous intercourse by evidence which is clear, cogent, and convincing. If you find from the evidence which is clear, cogent, and convincing that the defendant committed adultery with George B. Gatling, your answer to the seventh issue will be 'Yes.' If not, your answer to the seventh issue will be 'No.' "

The exception of the plaintiff to this charge must be sustained. In criminal cases the burden is upon the plaintiff to prove the charge "beyond a reasonable doubt," or "to the satisfaction of the jury." But in civil cases the rule is that the party upon whom lies the burden of proof is called upon to establish his allegation merely "by the preponderance of the evidence."

There are some exceptions to this in matters of an equitable nature, as to which the evidence must be "clear, strong, and convincing." For instance, when a party asserts and endeavors to prove by parol that a deed which is absolute on its face was in fact a mortgage. 8 Ency. Ev., 714; *Watkins v. Williams,* 123 N. C., 174; *Porter v. White,* 128 N. C., 45, and cases cited therein.

The same rule as to intensity of proof applies also where a party seeks the reformation of a written instrument. *Ely v. Early,* 94 N. C., 1; *Kornegay v. Everett,* 99 N. C., 30; *Hemphill v. Hemphill, ib.,* 436; *Warehouse Co. v. Ozment,* 132 N. C., 846. Also, the same intensity of proof is required to prove the terms of a lost will; and there are a few other instances. But they are all cases in which, formerly, the facts would have been found by the chancellor. *Ferrall v. Broadway,* 95 N. C., 551. Such intensity of proof is not required as to the issues in divorce, which is an action at law. Certainly, it has never been required in this State.

It is true that in *Kinney v. Kinney,* 149 N. C., 321, the judge charged the jury that the evidence of adultery must be "strong, convincing, and conclusive"; but notwithstanding this erroneous charge, the jury found the issue "Yes," and therefore there was no appeal by the plaintiff which would have presented the question as to the correctness of that part of the charge.

The plaintiff contends, however, that inasmuch as the jury found "Yes" in response to the eighth issue, "Did the plaintiff, before the time of the alleged adultery, maliciously turn the defendant out of doors?" that the error in the instruction as to the intensity of the proof on the seventh issue was harmless error. But this proposition is neither good law nor good morals. There is no legal or moral reason why a woman who has been abandoned by her husband shall be privileged to commit adultery any more than if she were a widow or a single woman. It is true that prior to the act of 1872, now Revisal, 1561 (2), such was deemed the law in this State (*Moss v. Moss*, 24 N. C., 55), and that the same was practically reiterated after that act in *Tew v. Tew,* 80 N. C., 316; but as was strongly intimated in *Steel v. Steel,* 104 N. C., 636, the latter decision cannot be sustained, "and was evidently tinged by the restrictive ideas of the older law." The Court further says, in the latter case, that the reason of the former law was that the wife, having no property (which at that time all belonged to the husband, as the law was formerly), might be forced, and probably would be, to form a new connection in order to obtain a support; but now, "under our statutes of 1869, 1874, 1879, she can compel her husband to provide her adequate support, both for herself and her children." *Steel v. Steel* in effect overrules *Tew v. Tew* on that point.

Nor is an agreement for separation, as formerly, *ipso facto* void because "against law and public policy." As *Smith, C. J.*, pointed out in *Sparks v. Sparks*, 94 N. C., 532, the law now recognizes the validity, under certain conditions, of such a deed by providing, in Code, sec. 1831, now Revisal, 2116, "that every woman living separate from her husband . . . under a deed of separation, executed by said husband and wife and registered . . . shall be deemed and held . . . a free trader," etc. *Sparks v. Sparks, supra,* has been cited as authority in *Smith v. King,* 107 N. C., 273; *Cram v. Cram,* 116 N. C., 294. Besides, under Code, sec. 1292, now Revisal, 1567, the wife who has been abandoned or deserted by her husband can sue for a support for herself and children without asking for a divorce. *Cram v. Cram*, 116 N. C., 294; *Skittletharpe v. Skittletharpe*, 130 N. C., 72; *Bidwell v. Bidwell*, 139 N. C., 409.

Our older authorities, therefore, which made the adultery of the wife committed after desertion or abandonment by her husband no ground for divorce, are without the reason which gave support to such rulings. They have now as little support in law as they ever had in morals.

The remedy which the statute gives to a wife abandoned or deserted by her husband is alimony and divorce *a mensa et thoro.* It does not privilege either one to commit adultery. If she does, the husband is entitled to a divorce. This was the ecclesiastical law. Nelson on Divorce, sec. 430. His wrong does not authorize her to commit a greater one. She can go back to live with him after his desertion; but he cannot be required to live with her after her adultery. The American decisions are conflicting, being based upon statutes of varying tenor.

Besides, in this case, the husband placed the wife in a sanitarium for the cure of her habit of drunkenness, and paid her or for her benefit, regularly, $50 per month for her support under the agreement of separation. He also paid her $400 per year rent for a home worth $5,000, which he had given her, and supported the children himself. She was not therefore subjected to temptation by the necessity of procuring a support, which was the reason for the rulings of the Court in *Tew v. Tew,* 80 N. C., 316, and cases prior thereto.

It may be that on another trial the jury will again find the wife was not guilty, but the plaintiff is entitled to a new trial to the end that the issue may be submitted under proper instructions as to the intensity of proof required to establish the charge.

Error.

ALLEN, J., concurs in result.

HOKE, J., concurring in the result: I concur in the decision awarding a new trial in this case for the error in the charge of the court on the degree of proof required to establish the seventh issue, and it may be that there are no facts amounting to legal evidence tending to show that plaintiff maliciously turned defendant out of doors. I do not agree to the position, however, nor do I think that it has the support of any authoritative decision, that a husband who has wrongfully abandoned his wife may successfully maintain an action for divorce *a vinculo* on account of her adultery. Under a long line of well-considered precedents, relief in such case was denied, not because the act of the wife was justifiable—it was never so regarded—but because the husband, on account of his own conduct in wrongfully withdrawing his association and protection from the wife, was not in a position to ask relief from the court. Neither the moral nor the legal aspect of this position is changed because the wife may, under certain conditions, now obtain alimony. The doctrine and the principle upon which it rests lie deeper and, in my opinion, should now and always prevail.

E. PELTZ AND L. RICHARDSON v. J. MILTON BAILEY.

(Filed 27 November, 1911.)

1. **Courts, Justices'—Appeal—Time of Docketing—Procedure.**
An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the Superior Court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Revisal, sec. 608.

2. **Same—Recordari—Laches—Attorney and Client.**
When an appeal from a justice's court has not been docketed within the time prescribed by the statute (Revisal, sec. 608), the appellant should move for a *recordari*, at the first ensuing term of the Superior Court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a *recordari* and to make proper inquiry of the clerk of the Superior Court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him.

BROWN, J., dissenting.

APPEAL from *Long, J.*, at April Term, 1911, of MITCHELL.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Charles E. Greene for plaintiffs.

W. L. Lambert, Councill & Yount, and Black & Ragland for defendant.

CLARK, C. J. This is an appeal from an order dismissing an appeal from a justice of the peace. The judge finds the facts as follows:

The judgment was rendered by a justice of the peace 22 July, 1910. The defendant appealed and gave notice thereof in open court. The justice was doubtful whether his fee of 30 cents had been paid, but upon conflicting evidence the court found that it had been. The next term of the Superior Court began 25 July and the next regular term was held in November. The appeal was not sent up till 27 March, 1911. At November term the defendant attended court, but was informed by his attorneys that the cause could not be tried at that term and returned home. Neither the defendant nor his counsel asked the clerk, nor examined the docket at that term to see, whether the cause was docketed or not. Nor was any *recordari* asked for nor was there any offer at that term to docket the case.

The appellee has rights as well as the appellant. The failure to docket the appeal in this case at the November term was negligence on the part of the appellant which entitled the appellee to have the appeal dismissed. This point has been so often held by this Court that it admits of a mild surprise that it can again be presented. In *Pants Co. v. Smith,* 125 N. C., 588, the Court held that an appeal from a justice of the peace should be dismissed, on motion of the appellee; "when not docketed for trial at the next succeeding term of the Superior Court, if it began more than ten days after judgment rendered." The Court further said that this provision of the statute was "reasonable in order to prevent further delay and put an end to litigation in a reasonable time," citing *S. v. Johnson,* 109 N. C., 852; *Ballard v. Gay,* 108 N. C., 544; *Davenport v. Grissom,* 113 N. C., 38.

In *Davenport v. Grissom, supra,* the Court held that an appeal from the judgment of a justice of the peace rendered more than ten days before the next ensuing term of the Superior Court should be docketed at that term, and that an attempted docketing at a subsequent term is a nullity; hence, that such appeal was not in the Superior Court and the plaintiff could not take a nonsuit. In that case the Court held that the judge properly held that he "had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had his remedy (if in no default) by an application for a *recordari* at the first ensuing term of the Superior Court after appeal taken. *Boing v. R. R.,* 88 N. C., 62." This case has been cited since with approval. *Pants Co. v. Smith, supra; Johnson v. Andrews,* 132 N. C., 380; *Johnson v. Reformers,* 135 N. C., 386; *Blair v. Coakley,* 136 N. C., 407; *MacKenzie v. Development Co.,* 151 N. C., 278.

In *Johnson v. Andrews, supra,* the appellant was held excused because the return to the appeal was delivered to the clerk and 50 cents was paid him by the appellant to docket the appeal; and there being no civil docket made up at that term, the appellant asked the clerk if the appeal had been docketed, and was told by him that it had been; hence the appellant was in no default and was entitled to have his case tried. In the present case the appellant did not pay the clerk for docketing the appeal and made no inquiry as to whether it had been sent up or whether it had been docketed, and neither he nor his counsel paid any attention to the matter. The appellee had the right under the statute and the repeated decisions of the Court to consider the litigation terminated.

Revisal, 608, requires an appeal from the justice of the peace to be docketed at the next ensuing term of said court, which the Court has held means the next ensuing term "which begins more than ten days after the judgment in the magistrate's court"; and the statute provides further that the case shall be triable at such first term of the Superior Court at which the appeal is required to be docketed. The courts have no more right to dispense with such requirement as to docketing an appeal in the Superior Court than to disregard the similar provision as to docketing an appeal in this Court. To further expedite the trial of appeals from justices, Revisal, 609, provides that such causes shall be tried upon the original papers.

The only cases in which an appeal can be docketed either in the Superior Court or in this Court, after the next ensuing term, is when there has been no laches on the part of the appellant or when there is the consent of parties. *Jerman v. Gulledge,* 129 N. C., 242.

In *MacKenzie v. Development Co.,* 151 N. C., 277, this Court reviewed the decisions and reaffirmed the ruling that "an appeal from a justice of the peace must be docketed at the next ensuing term of the Superior Court commencing more than ten days after the notice of the appeal. An attempted docketing at a later term is a nullity." Revisal, 307, 308. And further reiterated what was said in *Pepper v. Clegg,* 132 N. C., 316, "That the employment of counsel does not excuse the client from giving proper attention to the case. *McLean v. McLean,* 84 N. C., 366; *Vick v. Baker,* 122 N. C., 98; *Norton v. McLaurin,* 125 N. C., 185"; to which was added: "When a man has a case in court, the best thing he can do is to attend to it."

The courts have sufficient employment to decide the cases which are presented to them on the merits, without taking up valuable time to consider pleas to excuse the negligence of parties who do not think enough of their appeals to attend to them in the time provided by statute. After such time the appellee is entitled to consider the litigation at an end.

The judgment dismissing the appeal is

Affirmed.

BROWN, J., dissenting. Upon the facts as found by the judge of the Superior Court, the defendant took an appeal in open court from the judgment rendered, and paid the fees of the justice of the peace fixed by law, and demanded that the transcript be forwarded to the Superior Court. This was not done. I think the defendant did all the law required of him, and that it was the duty of the justice to forward the appeal without further request. Having done all the law required, I think the defendant ought not to be charged with the justice's neglect, and that the case should be docketed as upon *recordari.* Where there is no substantial negligence upon part of a litigant, his cause should not be dismissed. The law favors trials upon the merits.

E. A. WELLMAN v. J. A. HORN.

(Filed 27 November, 1911.)

1. **Statute of Frauds—Contract to Convey Lands—Memoranda—Lawfully Authorized Agent.**

A memorandum of a contract to convey land, written at the request of the contracting parties and in their presence, sufficiently stating the terms and conditions of sale, designating the lands sold, with the names of the parties appearing therein, is sufficient to make a valid contract under the statute of frauds.

2. **Same—Signing—Name in Memoranda.**

It is not necessary that a contract to convey lands be subscribed by the party to be bound thereby, and the requirements of the statute of frauds are met if his duly authorized agent write his name within a sufficient memorandum of the agreement.

3. **Statute of Frauds—Contract to Convey Lands—Lawfully Authorized Agent—Parol Authority.**

The authority of a duly authorized agent of a party to be bound by a contract to convey lands need not be in writing under the statute of frauds.

4. **Same—Description—Signing—Name in Memorandum.**

A, having agreed to sell his home place to B, the parties requested C to witness the terms and conditions of the sale, and B having given A his note in part payment of the purchase money, C, in the presence of A and B, wrote the following memorandum of sale: "$5,000 January 2, 1911; $5,000 January 2, 1912. B to pay the above to A when he makes deed to A for B's home place, 3 October, 1910." C read this memorandum over to A and B, and they said it was correct. B resisted suit to recover the purchase price on the ground of the statute of frauds: *Held*, C was the lawfully authorized agent of A to write the contract, within the meaning of the statute of frauds; the property contracted for was sufficiently described; the writing of A's name in the memorandum was a sufficient signing, and the contract is a valid one.

APPEAL by defendant from *W. J. Adams, J.*, at Summer Term, 1911, of CLEVELAND.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark*.

Reyburn & Hoey and Burwell & Cansler for plaintiff.
O. Max Gardner and O. F. Mason for defendant.

CLARK, C. J. This was an action for the specific performance of a contract to convey land and to recover the balance of the purchase price. On 3 October, 1910, the plaintiff contracted orally to sell his home place to the defendant for $10,000, one-half payable 2 January, 1911, and the other 2 January, 1912. It was in evidence that soon afterwards the parties by agreement went to the First National Bank to get C. C. Blanton to witness the trade, and the defendant stated to Blanton in plaintiff's presence that he had bought plaintiff's home place for $10,000 and wanted Blanton to witness the trade and wanted to make a payment to bind the trade, and suggested $50, but upon the plaintiff's objecting, the defendant then and there gave his note for $500 due 2 January, 1911, to bind the trade; Blanton wrote the note, which defendant signed, and it was also witnessed by Blanton. It was also in evidence that thereupon the defendant asked the plaintiff for something to bind him; that the plaintiff gave a receipt for the $500 note, Blanton writing and witnessing it, and that after the receipt was given the defendant said: "Now, we had better call over the amount to be paid and when it is to be paid," and said: "I am to pay the remaining part of $5,000 outside of this note on 2 January, 1911, and I am to pay Wellman the remaining $5,000 on 2 January, 1912."

It was further in evidence: "That Blanton drew a bank deposit slip near him and wrote down what defendant said, as he stated it, the defendant standing on the right of Blanton and the plaintiff on the left, where both could see what he was doing; that after Blanton wrote the memorandum he said: 'Boys, let's see if we understand this trade.' Then Blanton read over the following memorandum, which both parties agreed was correct: '$5,000 2 January, 1911; $5,000 2 January, 1912. J. A. Horn to pay the above to E. A. Wellman when he makes deed to Horn for Wellman's home place, 3 October, 1910.' "

There was evidence in corroboration and evidence contradictory of the above. The judge recited the above and the other evidence, and told the jury that if they should find that Blanton in the presence of the defendant, wrote the memorandum at the request of the defendant, embracing therein the terms of the contract, and thereafter read it to the parties, and that the defendant then agreed that the memorandum was a correct statement of the contract, they would find that Blanton was lawfully authorized by the defendant to make the memorandum, and would answer the first issue "Yes." And unless they so found, to answer the first issue "No." The jury responded "Yes."

The statute of frauds was pleaded, but this memorandum complies with that statute, because, as the jury find the facts, there was sufficient signing; the memorandum embraced all the essential elements of the contract; it was sufficiently definite and contained all the terms of the agreement.

Under the statute of frauds it is not necessary that the contract should be subscribed. It is sufficient if it is signed by the party to be charged or by some one duly authorized by him. If the name "J. A. Horn" in the memorandum had been signed by the defendant, it would have been sufficient. It is equally sufficient if "J. A. Horn" was written therein by some one authorized by him. It is not necessary that such authority should be in writing. There was evidence that Blanton wrote the memorandum, including the name "J. A. Horn," in his presence and by his authority, and that the defendant could see him while he was writing.

The defendant subsequently, on 5 October, wrote the plaintiff a letter in which he said: "I would like to git out of our land trade if it would suit you. I cannot rent my plase so it will pay," and went on to give other reasons why he wished to be released. The jury found all the other issues also in favor of the plaintiff, to wit, that the plaintiff had tendered a good and sufficient deed, which the defendant refused to accept, and that plaintiff had not made any fraudulent representations in regard to the matter. The case was fully argued below and here. But the above presents the real point in controversy, and we find no error in the record of the trial below.

The statute of frauds, Revisal, 976, provides: "All contracts to sell or convey any lands, etc., shall be void unless the *said* *contract* or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized."

Speaking for myself only, the statute does not require the agreement to pay the purchase money to be in writing, but only the contract "to sell or convey land." The decisions on this point have been conflicting, and are fully stated on both sides in *Brown v. Hobbs,* 154 N. C., 546 and 547-556, in the two concurring opinions therein set out. The point is not made in this case, and for the purpose of this decision the case has been tried and decided both below and in this Court as if it were conceded by the plaintiff that the contract of the defendant to pay the purchase money was required to be in writing. The oral contract to pay the purchase money is not controverted, nor the sufficiency of the description, "the Wellman home place."

No error.

CHARLES ROSE ET AL. v. D. T. BRYAN ET AL.

(Filed 27 November, 1911.)

Homestead—Ownership and Occupation—Deeds and Conveyances—Fraud.

When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them (Revisal, secs. 961-963), and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Revisal, sec. 686, has no application. *Sash Co. v. Parker,* 153 N. C., 130, cited and distinguished.

APPEAL by plaintiffs from *Ward, J.,* at March Term, 1911, of NASH.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Jacob Battle for plaintiffs.
T. T. Thorne for defendants.

CLARK, C. J. On 7 November, 1908, the defendant O. Sadler made an assignment of all his property, including this lot of land and dwelling-house, for the benefit of creditors, specifying therein that the trustee should reserve and set apart his homestead exemption in said lot. On 28 December, 1908, Sadler conveyed said lot to his wife without any consideration. Soon thereafter the plaintiffs docketed their judgments.

The court set aside the conveyance to the wife as void in regard to the plaintiffs, but adjudged that the debtor, O. Sadler, was entitled to have his homestead set apart in said lot. The plaintiffs excepted, and that presents the only point before us.

Sadler being insolvent, the deed of gift to his wife was fraudulent at law and void as to his creditors (Revisal, 961-963); but when the deed was set aside the judgment debtor was entitled to claim his homestead in the land conveyed. *Crummen v. Bennett,* 68 N. C., 494; *Arnold v. Estis,* 92 N. C., 162; *Rankin v. Shaw,* 94 N. C., 405; *Dortch v. Benton,* 98 N. C., 190. The land is still occupied by Sadler and he is a resident of the State, and hence entitled to his homestead. The court having declared the deed of gift to his wife void, he holds the title, as to these plaintiffs, as if no deed had been executed.

Revisal, 686, applies only to the "allotted homestead," which it provides "shall be exempt from levy so long as owned and occupied by the homesteader or by any one for him; but when conveyed by him in the mode authorized by the Constitution, Art. X, sec. 8, the exemption thereof ceases as to liens attaching prior to the conveyance. The homestead right being indestructible, the homesteader who has conveyed his allotted homestead can have another allotted, and as often as may be necessary." This section has no application to this case.

The plaintiffs rely also upon *Sash Co. v. Parker,* 153 N. C., 130. That also has no application. There a judgment having been docketed, the judgment debtor and his wife subsequently conveyed the land out of which the homestead might have been allotted, and the grantee took possession. The Court held that the judgment debtor, not "owning and occupying" the land, was not entitled to have a homestead allotted therein, and that it was subject to sale under the lien of the docketed judgment. This has been cited with approval, *Fulp v. Brown,* 153 N. C., 533; *Davenport v. Fleming,* 154 N. C., 293. The judgment debtor there having in a legal mode conveyed his interest in said land and given possession thereof, was no longer "owner and occupier" of said land, and therefore could not claim a homestead therein, and the purchaser had no right to claim the homestead of another man against the lien of a judgment docketed against the property before he bought it.

The judgment below is

Affirmed.

GASTON KELLY v. ENTERPRISE LUMBER COMPANY.

(Filed 27 November, 1911.)

1. **Deeds and Conveyances—Timber Reserved—Time of Cutting—Notice to Grantor—Grantee of Timber.**

A conveyance of lands reserving in the grantor all the timber of every description, without specifying within what time the timber is to be removed, requires by construction that the grantor should remove the timber within a reasonable time after notice to do so given by the grantee; and the grantee of the timber reserved holds the reservation of the timber in the same plight as this grantor held it.

2. **Deeds and Conveyances—Timber Reserved—Size—Date of Deed.**

A reservation in the grantor of the timber upon the lands conveyed is of such trees large enough to be timber at the time of the execution of the deed.

3. **Same—Injunction—Ascertainment of Size—Experts—Reference—Power of Court.**

When a conveyance of lands reserved in the grantor all the timber thereon, and it appears by construction of the instrument that the trees should be of that size as of the date of the deed, it is reversible error for the court, not having found that the contention of the plaintiff was not *bona fide* (Revisal, 809), to dissolve an order restraining the cutting of the timber upon the defendant's giving bond, solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size at the date of the deed (Revisal, 809), as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. (Revisal, 519 (3).)

4. **Deeds and Conveyances—Timber Reserved—Size—Specifications as to Wood and Fence Rails—Interpretation.**

A conveyance of land reserved in the grantor all timber trees thereon, but permitted the grantee to cut firewood and fence rails from trees "not over 14 inches in diameter 2 feet from the ground": *Held*, the specification of the sizes of the trees from which the grantee could cut firewood and fence rails, without prospective words, does not of itself affect the construction of the deed that the trees large enough for timber were reserved.

ALLEN, J., did not sit.

APPEAL from Duplin, from order rendered by *Peebles, J.*, at chambers in New Hanover, 14 April, 1911.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

H. D. Williams and Davis & Davis for plaintiffs.

Langston & Allen and Stevens, Beasley & Weeks for defendant.

PLAINTIFF'S APPEAL.

CLARK, C. J. The question on this appeal arises upon the construction of the following reservation in a deed of 2 December, 1900, from the Cape Fear Lumber Company to the plaintiff: "It is understood and agreed by the parties to this deed, that the party of the first part hereby conveys to the party of the second part only the land with its agricultural privileges, together with all the necessary firewood and fence rails that may be needed on said land herein conveyed (*until said timber is cut by the Cape Fear Lumber Company*), to be cut from pine trees not over 14 inches in diameter 2 feet from the ground; also two cypress trees to be marked with the name of the party of the second part by the agent of the said Cape Fear Lumber Company; reserving in the grantors, the said Lumber Company, *all the timber* of every description on said land, except as hereinbefore specified, together with the rights and privileges appertaining thereto."

On 11 February, 1911, the Cape Fear Lumber Company conveyed to the defendant, the Enterprise Lumber Company, the timber which it had reserved in conveying the land to the plaintiff. The deed of the Cape Fear Lumber Company to the defendant uses the following language: "The land upon which this said tract of timber stands belongs to Gaston Kelly, having been sold to him by the Cape Fear Lumber Company, *with the timber reserved.*"

Cases of this nature usually arise where the owner conveys the timber, reserving the land. Here the deed of the Cape Fear Lumber Company to the plaintiff, 2 December, 1900, conveyed the land, reserving the timber. The court held that only the trees which were large enough to be "timber" trees on 2 December, 1900, were reserved, but that it being impossible to ascertain what trees had become timber trees since that date, dissolved the injunction upon the defendant giving bond in the sum of $5,000.

In *Mining Co. v. Cotton Mills,* 143 N. C., 307, the Court held: "Whether the right to cut timber is a grant or a reservation, it expires at the time specified. When no time is specified, the grantee of such right takes upon the implied agreement to cut and remove within a reasonable time; whereas when the grantor of the fee reserves or excepts the timber, and there is no limitation to indicate when the reservation shall expire, then the grantee of the fee must give notice for a reasonable time that the grantor must cut or remove the timber included in his reservation." The defendant, the Enterprise Lumber Company, here holds the reservation of the timber in the same plight that the Cape Fear Lumber Company held it, and the grantee of the fee, the plaintiff Kelly, should give reasonable notice to the defendant to cut or remove all timber which was included in the reservation, *i. e.,* such trees as were large enough to be timber at the time of the deed of 2 December, 1900.

The Court not having found as a fact that the contention of the plaintiff was "not *bona fide,*" as required by Revisal, 809, he should have continued the injunction as provided by Revisal, 807, 808, as to all trees which were not large enough to have been "timber" on 2 December, 1900. This is not impossible of ascertainment, as his Honor held, but may be determined by experts. The parties may possibly agree as to the trees, or in default of agreement the court may designate an expert or a referee for that purpose, just as a surveyor is appointed in cases of a disputed boundary.

Revisal, 519 (3), provides for a compulsory reference, "3. When the case involves a complicated question of boundary or (is) *one which requires a personal view of the premises.*"

The order requiring a bond is set aside and an injunction till the hearing is ordered, as to all trees that were not timber trees on 2 December, 1900.

Reversed.

DEFENDANT'S APPEAL.

The sole question presented on this appeal is the ruling of his Honor that under the reservation in the deed above set out the grantor reserved only such trees as were large enough for timber trees on 2 December, 1900.

The language used is that he reserves "all the *timber*" of every description. There being no prospective words, this ruling was correct. *Robinson v. Gee,* 26 N. C., 186; *Whitted v. Smith,* 47 N. C., 36; *Warren v. Short,* 119 N. C., 39; *Lumber Co. v. Hines,* 126 N. C., 254; *Hardison v. Lumber Co.,* 136 N. C., 175. It is true, the deed permitted the grantee Kelly to cut firewood and fence rails from pine trees if "not over 14 inches in diameter 2 feet from the ground," and also allowed him to cut two cypress trees without restriction as to size. But these privileges to Kelly do not affect the fact that the grantor reserved only the "timber trees," without any prospective words, and therefore the reservation was only of the trees that were large enough to be timber trees at the date of the deed. The judgment in this respect is

Affirmed.

M. D. McCALL v. J. P. SUSTAIR.

(Filed 27 November, 1911.)

Slander—Intent—Evidence—Larceny—"Took" and "Stole"—Words and Phrases—Unequivocal Terms—Burden of Proof—Questions for Jury.

In an action for damages for slanderous words spoken by defendant of plaintiff, the evidence for plaintiff tended only to show that defendant on several occasions had said to others that his brother had caught the plaintiff "taking some pokes of cotton out of his patch the night before," which he (the defendant) believed to be true; that on another occasion the plaintiff and defendant were together with the purpose of the latter to "make up the trouble," the former denying that he had taken the cotton, the latter insisting that he had, from the information his brother had given: *Held*, the evidence was not an unequivocal statement that plaintiff had stolen the cotton, and being capable of a different construction, was properly submitted to the jury, with the burden of proof on the plaintiff to show whether the words, in view of the circumstances under which they were used, naturally imported that the plaintiff had stolen the cotton, and whether defendant so intended to state. *Fields v. Bynum*, 156 N. C., 413, cited and distinguished.

WALKER, J., dissents; HOKE, J., concurs in the dissenting opinion.

APPEAL from *Biggs, J.*, at May Term, 1911, of MECKLENBURG.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

McCall & Smith, Burwell & Cansler, and R. S. Hutchinson for plaintiff.

Stewart & McRae and Maxwell & Keerans for defendant.

CLARK, C. J. This is an action for slander, on an allegation that the defendant had charged the plaintiff with stealing cotton, said charge having been made on three several occasions, viz., to John Cochrane, to L. A. Ferguson, and to Charles Simpson. Neither justification nor privilege was pleaded, but a denial of having charged the plaintiff with larceny.

The issues submitted were:

"Did the defendant speak and publish of and concerning the plaintiff the alleged slanderous words set out in article 1 of the complaint with the intent to thereby charge the plaintiff with the crime of larceny?"

This paragraph alleged that the charge was made to one John Cochrane. The second issue was in the same words as to the alleged conversation with L. S. Ferguson, and the third issue was in the same words as to the alleged conversation with Charles Simpson.

There was no exception to the issues. The judge in charging the jury told them that the charge of larceny need not be made in express terms by declaring that the person is a thief or that he has stolen, but the imputation may be made by the use of any apt words which in connection with the other words and in view of the circumstances under which they are used naturally import that the person spoken of has committed the crime of larceny, and that the words were used in that sense. And further charged them that if they found "from the greater weight of evidence that the defendant spoke to or in the hearing of John Cochrane words which should be reasonably construed to mean a charge of larceny of cotton by McCall from J. P. Sustair, and that defendant intended to charge him with larceny in uttering said words, they would answer the first issue 'Yes.' "

The plaintiff excepted because the judge inserted the words, "and that defendant intended to charge him with larceny in uttering said words."

The plaintiff also excepted because the court charged the jury, "The words, to be slanderous, must have been spoken with the intent to charge the crime of larceny, and the words used under the circumstances must be so understood by the hearers."

The judge used the same instructions, that there must be an intent on the part of the defendant to charge the plaintiff with larceny, in instructing the jury on the second and third issues. This presents substantially the controversy submitted on appeal.

The proof was not that the defendant had used the word "stole," but that he said to Cochrane that his brother had "ketched McCall taking some pokes of cotton out of his cotton patch the night before." As to the second issue, Ferguson testified that he "told defendant that he didn't doubt that Thomas had lost the cotton, but didn't believe that Dave McCall got it, to which defendant replied, 'I do,' and that defendant further said: 'I believe Dave McCall got it, for Thomas said he had seen him get it.'" As to the third issue, Simpson testified that the "defendant told McCall that he had come down to make up with him," and said, "Now, we have come up here to make up this trouble between you and Thomas about taking Thomas's cotton," to which McCall replied, "I never took any cotton from Thomas or any one else." The defendant replied, "Thomas saw you take it, and you know you got it; Thomas says you got it," and McCall replied that he didn't get it and was very sorry they accused him of getting it and he had not taken cotton from any one.

If the evidence had been that the words used were unequivocal that the plaintiff "had stolen the cotton," then the judge would have been justified in charging the jury that if they believed the evidence they should answer the issue "Yes." But here the words proven were that the plaintiff had "taken the cotton." The judge therefore properly charged the jury that the burden was upon the plaintiff to find whether the words in view of the circumstances under which they were used naturally imported that the persons spoken of had committed the crime of larceny, and that the words were used with the intent to charge the plaintiff with larceny in uttering said words. The words were not an express charge of larceny, because a "taking" of cotton is not necessarily larceny. Whether the use of that word was intended to convey, under the surrounding circumstances, a charge that the defendant had "stolen" the cotton, was a matter which was properly left to the jury.

In *Lucas v. Nichols,* 52 N. C., 36, the Court said: "The words used being ambiguous and capable of a double construction, it was proper for the judge to leave it to a jury to decide under the circumstances whether it was intended thereby to charge the plaintiff with a crime."

The plaintiff contends here that this well-settled principle is not in point, because only one opinion could be drawn as to the meaning of the language used. But we do not think so, and neither did the jury to whom the matter was submitted. They have found as a matter of fact that the defendant did not intend to charge the plaintiff on either occasion with larceny. We cannot know how far the jury may have been influenced by the fact that if the defendant intended to charge the plaintiff with larceny his conduct in attempting to make up the matter with him would have been the compounding of a felony, and therefore that it was unlikely that he had charged the plaintiff with the felonious taking of the cotton.

No witness testified that the word "steal" was used at any time, but in all the conversations the word used was "take" or "got," which does not necessarily imply a "felonious taking"; and as to the surrounding circumstances, there is the fact that there was an attempt by the defendant and his brother to settle the matter by getting the plaintiff to pay for the cotton. There is also the testimony of the defendant that he did not mean to charge the plaintiff with stealing the cotton and did not think that the plaintiff had stolen it, and had never told any one that he thought the plaintiff had stolen the cotton. In *Hampton v. Wilson*, 15 N. C., 470, *Ruffin, C. J.*, said that unless the words used could bear only one construction "it was for the jury to pass upon the intent, to be collected from the mode, extent, and circumstances of the publication." To same effect is *Studdard v. Linville*, 10 N. C., 474, where the Court laid down the rule, "Words to be slanderous must be spoken with an intent to slander and must be so understood by the hearer." That case has been approved in *McBrayer v. Hill*, 26 N. C., 139; *Pugh v. Neal*, 49 N. C., 369.

The words "took" or "got" being susceptible of more than one construction, the court properly left the question of the intent and meaning of the language to the jury to say whether the hearers would reasonably have construed them as charging larceny of the cotton. "Where in an action for slander the words are ambiguous, but admit of slanderous interpretation, it should be left for the jury to say under all the circumstances what meaning was intended." *Reeves v. Bowden*, 97 N. C., 32; *Lucas v. Nichols,* 52 N. C., 32. The intent with which the words were used was left to the jury in *S. v. Benton,* 117 N. C., 788; *Webster v. Sharpe,* 116 N. C., 470, and *Hudnell v. Lumber Co.,* 133 N. C., 169.

In *Wozelka v. Hettrick,* 93 N. C., 13, relied on by the plaintiff, the defendant admitted that he spoke the words charged, which were slanderous *per se,* and the Court held that an honest belief in the truth of the charge was not a defense and could be considered by the jury only in mitigation of damages.

In the recent case of *Fields v. Bynum,* 156 N. C., 413, it was not contended that the words spoken were of doubtful import, as in this case, but they plainly and unequivocally charged the plaintiff Fields in the nighttime had burned, not one, but two, sawmills of the defendant. The language there used is set out in the opinion by *Mr. Justice Brown* and is too plain to admit of any doubt as to its meaning. It was not even contended that the words were not actionable *per se.* The defense was that the occasion upon which they were spoken was privileged. The difference between that case and this is plainly manifested in the statement of facts.

No error.

WALKER, J., dissenting: A man's intention cannot, in the nature of things, have anything to do with the slanderous character of his words. He is to be judged by what his words mean, and not by what his secret intention may have been. The law gives an action for slander because of the dangerous tendency of the words. You violate a fundamental maxim of the law when you say that a man may utter words which, on their very face, mean one thing defamatory of his neighbor, and yet another because he did not intend that they should have that meaning. It is not his intent that does the harm, but his actual words. It is a well-known maxim of the law that a man is presumed to intend the natural consequences of his acts. It ignores his hidden purpose and measures his liability by what he has done or said, if it is injurious in its consequences. His secret intention is something intangible and sometimes unprovable, and he must, therefore, be held to have meant what his words import. If the doctrine of the majority is to be declared as the law, a man may utter words outrageously derogatory of his neighbor, and unless they constitute what the law regards as a slander *per se,* he is not liable, unless he had the bad motive. This cannot be the law. I have the highest authority for saying that it is not. "In actions for defamation it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation, but if he has in fact done so, he must compensate the party. He may have meant one thing and said another; if so, he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation, he jests at his peril. Or he may have used ambiguous language which to his mind was harmless, but to which the bystanders attributed a most injurious meaning; if so, he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial, save in so far as his hearers could perceive it at the time. Words cannot be construed according to the secret intent of the speaker. 'The slander and the damage consist in the apprehension of the hearers.' " Newell on Slander, p. 301, sec. 22.

In *Belo v. Smith,* 42 S. W., 850, the Court said substantially, that in an action for using defamatory words, it is not so much the idea which the speaker or writer intends to convey, as what he does *in fact* convey. If the language used may import a slanderous charge, its meaning must be ascertained from the words as commonly understood, and as to how they would impress the bystanders, and not from what the defendant intended by it. The intention of the speaker is material, not on the question of liability, but only as bearing on the question of damages. The cases supporting the principle just stated are very numerous, and emanate from courts of the highest authority upon the subject. *King v. Sassaman,* 54 S. W., 304; *Dunlevy v. Wolerman,* (Mo.) 79 S. W., 1165; *Williams v. McKee,* (Tenn.) 38 S. W., 730; *Short v. Acton,* (Ind.) 71 N. E., 505; *Nicholson v. Rust,* (Ky.) 52 S. W., 933; *Hamlin v. Fautl.,* 95 N. W., 955; *Jackson v. Williams,* (Ark.) 123 S. W., 751; *Hatch v. Potter,* (Ill.) 43 Am. Dec., 88; *Holmes v. Jones,* (N. Y.)

41 N. E., 409. In *Rodgers v. Kline,* 31 Am. Rep. (Miss.), 389, the Court said: "The absence of this intent or purpose does not *per se* exonerate the publishers of the article from responsibility, if in fact such language was used in it as would inflict an illegal injury on plaintiff; for the injury to him would be all the same, whether it was the result of design on the part of defendants or of their carelessness and negligence."

I have not discussed the question whether the words used, being in their nature an unequivocal though not direct charge of larceny, are actionable *per se.* There is authority for saying that they are, and similar words have been held to constitute slander *per se. Estes v. Autrobus,* 13 Am. Dec. (Mo.), 496; *Hinesley v. Sheets,* 63 Am. St. Rep. (Ill. App.), 356; *Alcom v. Bass,* 46 N. E. (Ind.), 1024; *Bornman v. Boyer,* 5 Am. Dec. (Pa.), 380. In *Alcorn v. Bass, supra,* the Court said: "If the words charged, taken in connection with the circumstances under which they are alleged to have been spoken, were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime of larceny, they were actionable. *Drummond v. Leslie,* 5 Blackf., 453. The words alleged to have been spoken by appellant, 'Well, I believe you took it,' were not actionable *per se,* but they might be so by reason of extrinsic facts, including other words spoken in the same conversation." See, also, *Wozelka v. Hettrick,* 93 N. C., 10, which seems to be practically to the same effect.

In this case, the words uttered, under any possible or reasonable construction of them, clearly and unmistakably implied a charge of slander, and they present a very aggravated case. The use of them was the equivalent of saying that the defendant had stolen the cotton, and, therefore, they amounted to a charge of larceny; in other words, they meant that the plaintiff had committed larceny, and nothing else. The law does not permit a man to clearly insinuate, in the presence and hearing of others and in the most insulting way, that his neighbor, who is also present, has stolen cotton, and excuse himself because he did not say, in so many words, and in direct and positive speech, that he had stolen it. The insinuation, under the circumstances, stands for the express charge, for it does just as much harm and tends to a breach of the peace. If a fight had ensued, we would not hesitate to hold the defendant guilty of an affray, because of the provocation he gave. I cannot well distinguish the words in this case from those which were held, at this term, in *Fields v. Bynum,* 156 N. C., 413, to be actionable, except in this respect, that they are more offensive and more significant of a purpose to slander and defame the plaintiff. In that case, the defendant accused the plaintiff of burning the mill, and added that his neighbors believed it, as he burnt it last June; while in this case the defendant plainly accused the plaintiff of stealing the cotton, if his words mean anything at all. What were they? "I have been over to my brother Tom's helping to watch his cotton, as Dave McCall has been taking it"; that his brother had caught him "taking some pokes of cotton out of the patch the night before." He said to plaintiff that his brother had told him he had taken the cotton, and he had better fix it up. This was in the presence of Charles Simpson. Even after plaintiff had denied taking the cotton, he repeated the charge against him, saying: "Thomas saw you take it, and you know you got it," and upon further denial, he persisted in making the accusation. In the *Fields case* there was no more unequivocal charge of arson than in this case of larceny. In both cases the words imputed but one thing, the perpetration of a felony—in the one case, arson, and in the other, larceny; and it is impossible to make anything else out of them. In the *Fields case* the words were not privileged because of the time, place, and manner of using them. That was one question in the case; the other was whether they were actionable, to which we gave an affirmative answer.

But it is said that the issues submitted were those raised by the plaintiff's own allegations and the denials of the answers. I do not so understand the allegations of the complaint. The words are set out with an innuendo, the office of which is to show the meaning and application of the charge, and is merely explanatory of the preceding words. It is said to mean no more than *id est* (that is) or *scilicet* (a word used in pleadings), as introductory to a more particular statement of matters previously mentioned in general terms. Black's Dict. (1 Ed.), 626; 25 Cyc., 449. It is intended to disclose the injurious sense imported by the charge. 25 Cyc., 451. Where the words are actionable *per se* or the meaning of the publication is plain and unambiguous, the use of it is not required, as its peculiar function is to point the meaning of the words. It has no reference to the intention of the speaker who made the charge. It is what he says and his words mean, and not what he intended, that hurts, or makes his victim smart under his plain accusation; and so it has been said that want of actual intent to injure furnishes no legal excuse. Read, then, the complaint in the light of these principles, and we find that nothing is said about intent, but everything about the meaning of the defendant's words, if it was necessary to explain that which was perfectly intelligible. No reasonable man in that audience could have heard the words without *knowing* instantly and without the trouble of thinking, what the defendant meant. It was, therefore, prejudicial error to inject into the issues submitted by the court, the question of intent. The court should have accepted, and submitted to the jury, the issues tendered by the plaintiff. The charge also was erroneous, in that it made the liability of the defendant turn entirely upon the intent with which the words were used, and not upon their meaning and the impression they made and were calculated to make upon his hearers, or, at least, the court laid too much emphasis upon the intent and misled the jury. They may have found the words to have been slanderous, and yet gave the verdict against the plaintiff, because they did not find that he had the intent to slander. This error in the charge is the subject of several of the assignments of error, and permeates the entire charge. It is more pronounced in the instruction, that "words to be slanderous must be spoken with the intent to charge the crime of larceny," which is duly excepted to in the second assignment of error. I do not understand that to be the law, but rather the meaning and effect of the words which are used, without regard to the intent, which would not injure if the words had not been spoken.

My conclusion is that there should be a new trial for the alleged error.

Hoke, J., concurs in this opinion.

THE FARRISH-STAFFORD COMPANY v. CHARLOTTE COTTON MILLS.

(Filed 27 November, 1911.)

Corporations, Insolvent — Factors—Contracts—Consideration—Preferred Stock—Debtor and Creditor—Distribution.

An agreement entered into by a manufacturing corporation and a factor provided that the latter should take a certain amount of preferred stock in the former, and so long as he held the stock he should sell at a certain commission the product of the corporation, the stock to be taken up by the corporation if the account was changed. By mutual consent this agreement was transferred by the factor to the plaintiff along with the preferred stock, and the corporation having become insolvent, the plaintiff seeks as a creditor a priority of payment of his stock to the other preferred stock issued by the corporation, there being insufficient funds after the payment of debts to pay this stock in full: *Held,* (1) the contract did not contemplate the insolvency of the corporation, and hence the question as to whether the corporation could thus retire its stock did not arise; (2) the plaintiff was not to be regarded as a creditor. He was entitled only to his pro rata part in the distribution of the funds with the other holders of the preferred stock.

APPEAL from *Adams, J.,* at October Term, 1911, of MECKLENBURG.

Civil action submitted upon an agreed state of facts. His Honor gave judgment for defendant, and plaintiff appealed.

J. Crawford Biggs and F. L. Fuller for plaintiff.
Tillett & Guthrie for defendant.

BROWN, J. The case agreed, which embraces much correspondence unnecessary to set out, discloses that Eldredge Lewis & Co., commission merchants of New York, were the factors of defendant, sold its product on commission, and advanced it money as its needs demanded. To retain defendant's business that firm became preferred stockholders in defendant corporation. By mutual consent the account was transferred to plaintiff, in consideration of which two hundred and fifty shares of preferred stock of defendant were issued to plaintiff, for which it paid $25,000. It has held this stock for many years and received dividends at 7 per cent annually thereon, aggregating $7,000.

The defendant went into voluntary liquidation in May, 1908, under the provisions of section 1195 of the Revisal, and the directors, D. W. Oates, J. M. Oates, and R. M. Oates, became trustees in dissolution. These trustees have paid all the debts of the corporation and converted into money all of its assets, and are now prepared to distribute these assets among those entitled thereto. There is not a sufficient amount to pay the preferred stockholders in full. The question before the Court under the facts stated is whether the plaintiff is a stockholder and, therefore, entitled only to its ratable share of the assets, or whether the plaintiff is a creditor and entitled to be paid in full.

The contract or agreement between the parties is contained in their correspondence, the substance of which is that plaintiff on 29 August, 1903, in order to secure defendant's business and become its factor, offered to loan it $25,000 and take as collateral security the same amount in preferred stock. This proposition was declined, the defendant stating to plaintiff that it did not care to increase its indebtedness.

Thereupon plaintiff at once wired defendant to forward certificate for two hundred and fifty shares preferred stock, as check for same was being then mailed. At same time plaintiff wrote defendant confirming the telegram, and saying: "Our understanding of the agreement between us is as follows: We are to represent the entire production of your mill and receive as compensation therefor 5 per cent commission on all goods made and shipped, we to guarantee the accounts. We will remit you on the 15th and 1st of each month for all invoices in hand up to those dates. This arrangement to remain in effect just so long as we hold the $25,000 worth of preferred stock. Should you for any reason desire to change the account, you are to take up this stock at par."

It is unnecessary to consider the feature of the case so learnedly argued by counsel on both sides, as to the power of a corporation to redeem or retire the stock of one shareholder to the prejudice of others. It is elementary that a corporation as a rule must treat all shareholders of the same class alike. We are of opinion that the plaintiff was never a creditor of the defendant for the $25,000, and is only a preferred stockholder and must share with the others of like class.

The contingency has never happened which is referred to in letter from which we have quoted, when according to the agreement the defendant could be called on to redeem the stock. Defendant's account has never been changed, or transferred from plaintiff to another factor. The defendant has continued to do business continuously with plaintiff from that date until it has ceased to manufacture. The record shows that at the time the defendant went into voluntary liquidation in May, 1908, the plaintiff had on hand a stock of goods of the defendant which it continued to sell and receive its commission until 23 October, 1909, when the last goods were sold. At the time of the sale of the last goods which the plaintiff had on hand, the account being balanced, disclosed that the plaintiff owed the defendant on account $946.31, and the plaintiff still owes this amount to the defendant on account.

The agreement did not mention the voluntary retirement of the defendant from business or its failure in business and subsequent insolvency. Those contingencies do not seem to have been in the contemplation or thoughts of either party. Evidently the plaintiff was willing to take the chances as to those.

We find nothing in the agreement which could prevent the defendant from going out of business, or which required it to take back the stock in case it did.

The judgment is

Affirmed.

COMMISSIONERS OF CLEVELAND COUNTY v. BANK OF GASTONIA.

(Filed 27 November, 1911.)

1. **Precincts—Quasi-municipal Corporations—Powers.**

   In this case *Held*, that Kings Mountain Precinct in No. 4 Township, Cleveland County, is a quasi-municipal corporation created by the State and vested with certain corporate powers. *Smith v. School Trustees*, 141 N. C., 143; *Board of Trustees v. Webb*, 155 N. C., 379, cited and applied.

2. **Bond Issues—Precincts—Legislative Authority—Sinking Funds—Restricted Levy—Negotiable Instruments—Particular Fund.**

   A legislative act empowering the issuance of bonds by a precinct for building and maintaining, etc., its public roads, authorizing taxes to be computed and levied on all taxable property therein, does not restrict the payment of the bonds so as to render them nonnegotiable by providing a maximum rate of taxation upon the property and poll; and, further, that "no sinking fund shall be created within less than ten years from the date of issuing said bonds," but allowing the properly constituted authorities to use, for the purposes of the act, "such sums of money remaining after the interest on said bonds shall have been paid"; and the bonds issued thereunder containing an unconditional promise to pay a sum certain in money at a fixed time to bearer, are a compliance within the provision of our negotiable instrument act as to the negotiability of a paper, which indicates a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount.

3. **Bond Issues—Precincts—Legislative Authority—Tax Levy—Restrictions—Payment—Negotiable Instruments.**

   A legislative authority to a precinct to issue bonds and levy taxes on all taxable property for the purposes of the act, does not affect the ultimate liability of the precinct for their payment in full by restricting the tax levy to a certain amount upon the property and poll.

APPEAL from *Webb, J.*, at February Term, 1911, of CLEVELAND.

Controversy submitted without action. His Honor rendered judgment for plaintiff, and defendant appealed.

Ryburn & Hoey for plaintiff.
Jones & Timberlake for defendant.

BROWN, J. By the act of Assembly, ch. 429, Public-Local Laws 1911, Kings Mountain Precinct in No. 4 Township, Cleveland County, is authorized to issue bonds in sum of $25,000 for the purpose of building roads, repairing those in existence, and for other purposes named in the act. An election was held and the act adopted and approved by a large majority of the qualified voters of the precinct. Kings Mountain Precinct in No. 4 Township, Cleveland County, has existed under well-known boundary lines for more than thirty years, and comprises an area of over 22,000 acres of land, the town of Kings Mountain being also situate therein.

The act also provides for a "Highway Commission of Kings Mountain Precinct," and gives it appropriate powers as a body corporate and politic.

Section 4 of the act provides for the levy within the township of a special tax to pay the interest on the bonds and eventually also to provide a sinking fund.

It is contended by defendant that the bonds are not negotiable, and are not a valid obligation of the precinct, because of the proviso in section 4 of the act. The entire section reads as follows:

SEC. 4. In order to pay the interest on said bonds, create a sinking fund for taking up said bonds at maturity, to compensate laborers employed on the roads in Kings Mountain Precinct, in No. 4 Township, and to establish, alter, repair, survey, lay out, grade, construct, maintain, and build the public roads and highways of Kings Mountain Precinct, in No. 4 Township, in Cleveland County, in good condition, the board of commissioners of the county of Cleveland, or other authorities vested with power of levying taxes for said county, shall annually compute and levy, at the time of levying other county taxes, a sufficient tax on all polls, real estate, and all personal property and all other subjects of taxation in said Kings Mountain Precinct which said commissioners or other authorities now or hereafter may be allowed to levy taxes upon for any purpose whatever, always observing the constitutional equation between taxes on property and taxes on polls: *Provided,* there shall not at any time be levied in Kings Mountain Precinct, in No. 4 Township, in the county of Cleveland, for the purpose of road improvement, and including all expenditures made necessary by this act or any act or statute now existing, a tax greater than twenty-five (25) cents upon the one hundred dollars ($100) worth of property and seventy-five (75) cents on each poll: *Provided further*, that no sinking fund shall be created by such levy within less time than ten years from the date of issuing said bonds, but the highway commission hereinafter created may use for the purpose of this act such sums of money remaining after the interest on said bonds shall have been paid, for the purpose of carrying out the provisions of this act.

We see nothing in this proviso, or in the whole act, which destroys the negotiability of the bonds. They contain an unconditional promise to pay a sum certain in money at a fixed time, and are payable to bearer, and fulfill all the requirements of negotiability. They are not promises to pay out of any particular fund, and the act by virtue of which they are issued does not profess to restrict their payment out of a particular fund.

Kings Mountain Precinct is a quasi-municipal corporation created by the State and vested with certain corporate powers. *Smith v. School Trustees*, 141 N. C., 143; *Board of Trustees Youngsville Township v. Webb*, 155 N. C., 379, and cases therein cited.

These bonds are the general and unrestricted obligation of that body corporate. They are not payable solely out of a particular fund, although a particular fund is provided for their payment. They therefore do not come within the description of the negotiable instrument act as nonnegotiable paper, for that instrument especially provides that "an unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount."

The fact that the special tax is limited to 25 cents on the property and 75 cents on the poll may affect the value of the bonds, possibly, but does not affect the ultimate liability of the precinct for their payment in full.

As said by the Supreme Court of the United States in *U. S. v. County of Clark*, 24 Law Ed., p. 629, "Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtors." 2 Daniel Neg. Inst. (4 Ed.), sec. 1491c; *Red Springs Hotel v. Red Springs, ante,* 137, and cases therein cited.

As we have heretofore substantially said in above cited case, in the event the special tax is insufficient to meet the demand upon it for interest and sinking fund requirements, the Legislature may authorize its increase, or the growth of the precinct and the increase in the taxable value of property render such increase unnecessary.

The judgment is
Affirmed.

W. C. NELSON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 November, 1911.)

1. **Railroads — Relief Department — Rules and Regulations — Sick Benefits—Ability to Work—Arbitration and Award.**

   A contract which provides that the amount of damages which may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement, is valid and will be upheld. Hence, if the principles governing arbitration and award were applicable, when a member of the relief department of a railroad company has voluntarily appealed to the advisory committee of the relief department of a railroad company, under the rules and regulations of the department, upon the question as to whether he was able to again resume his work, or continue to receive the sick benefits he had been drawing, he will be presumed to know the rules and regulations applicable and to have acquiesced in this method of adjustment, and is bound by the final decision of the committee, made in good faith and without oppression or fraud. The application of this doctrine to benefit societies and fraternal orders discussed by ALLEN, J.

2. **Railroads—Relief Department—Rules and Regulations—Knowledge Presumed.**

A member of a relief department of a railroad company cannot be heard to complain of an adverse decision of the advisory board thereof upon a matter he has appealed to it under the rules and regulations of the department, upon the ground of interest of the board in being selected by the company, for he is presumed to know how the board was constituted when he became a member and at the time he submitted his claim to its decision.

3. **Railroads — Relief Departments — Contract — Rules and Regulations—Decisions of Department—Collateral Attack—Fraud.**

The decision of the advisory board of a railroad company's relief department rendered on appeal to it by its member from the decision of the superintendent that he had sufficiently recovered of a sickness, not claimed through negligent act of the defendant, to resume work and cause the cessation of the benefits he had been receiving, cannot be collaterally attacked in an action brought in the courts, when rendered in good faith and in the absence of oppression or fraud.

CLARK, C. J., concurring in result.

APPEAL from *Ferguson, J.*, at March Term, 1911, of PITT.

This is an action to recover benefits, which the plaintiff alleges he is entitled to under the rules and regulations of the relief department of the defendant.

The plaintiff, an employee of defendant, became a member of the relief department on 28 June, 1902, and paid his dues, amounting to $6.15, up to 6 September, 1902, when he was accidentally injured.

After his injury he was paid, as benefits on account of his disability to work, $1 per day for twelve months, and thereafter 50 cents per day up to 15 May, 1905, making a total of $673.50.

On or about the last day, the superintendent of the department decided that the plaintiff was able to return to work, and he was notified to do so, but he refused, contending that he was still unable to work.

The plaintiff appealed from the decision of the superintendent to the advisory committee, and employed counsel to represent him. He was given a hearing by the committee, and this tribunal held that he was no longer under disability.

He then began this action, and the defendant pleads, as a defense, the rules and regulations of the department and the decision of the advisory committee.

There is no evidence of fraud and no claim that the injury to the plaintiff was due to negligence. The regulations of the department are fully stated in *Barden v. R. R.*, 152 N. C., 318, and in *King v. R. R., ante,* 44, and it is not necessary to do more than quote the part particularly relied on, which is as follows:

"65. All claims of members, or of their beneficiaries or other representatives, for benefits, and all questions or controversies of whatsoever character, arising in any manner or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language or the meaning of the regulations or acts in connection with the operation of the department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless a written appeal from his decision is made to the committee.

"If the party or parties so submitting any matter to the superintendent shall be dissatisfied with his decision, such party or parties shall appeal to the committee within thirty days after notice to the parties interested of the decision of the superintendent.

"When an appeal is taken to the committee, it shall be heard by said committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or of any other number not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties without exception or approval."

There was evidence on the part of the plaintiff that he was unable to work on 15 May, 1905, and that this disability continued up to the time of the trial, and evidence to the contrary by the defendant.

The defendant requested the following special instruction, which was refused, and defendant excepted:

"That if you believe the evidence in the case, the plaintiff was at the time of the alleged injury a member of the relief department of the Atlantic Coast Line Company, and agreed to be bound by the rules and regulations of said relief department, and accepted benefits therefrom in accordance with the said rules and regulations, and that there is no evidence of any fraud or deceit of any character practiced upon the plaintiff, either in signing the application for membership in said relief department or in inducing him to accept the benefits in said department after his said injury; and that the plaintiff voluntarily accepted benefits and elected thereby to obtain his rights under said contract in accordance with the rules and regulations of said relief department; and the court, therefore, charges you that as the plaintiff has submitted the questions in controversy in this action to the tribunal provided for in the rules and regulations of said relief department, of which he was a member, and the same having been duly and orderly considered by said advisory committee of said relief department, the plaintiff under the terms of his contract, as a matter of law, is bound thereby, and he cannot maintain this action, no fraud or undue influence having been proven, you will answer the issue as to the right of recovery by plaintiff in this action 'No.'"

There was a verdict and judgment in favor of the plaintiff, and defendant excepted and appealed.

Julius Brown for plaintiff.
Harry Skinner for defendant.

ALLEN, J., after stating the case: The question involved in this case is of general importance, and the principle announced will determine, in this State, the right of all benefit societies and fraternal orders, which provide for the payment of benefits to sick or disabled members, to establish, within the society or order, some tribunal with power to investigate the fact upon which the right to the benefit may depend, and whose decision shall be final, unless impeached for fraud.

We cannot declare that the decision of such a tribunal is binding upon a member who belongs to a fraternal order, and refuse to enforce it, on substantially the same facts, because it is invoked in behalf of the relief department of a railroad.

The principal contentions of the plaintiff, assailing the validity of the decision of the advisory committee, are that it is practically an arbitration; that on the facts developed a property right is involved; that an agreement to submit such a right to arbitration in advance of the controversy is invalid, because it is an agreement which ousts the courts of their jurisdiction, and that the advisory committee was not fairly constituted.

The defendant replies that if the action of the advisory committee is to be governed by the strict rules of an arbitration, no property right was submitted to the committee, but only the ascertainment of a single fact, that the committee was impartially constituted; and if not, that the plaintiff admitted his claim with full knowledge of the facts, and that there has been an award, which is final.

The defendant further says that the principles relied on are not applied, without qualification, in behalf of a member of an organization, who acquires his property right under and by virtue of its regulations.

There is some difference of opinion as to the motive behind the adoption of the rule that an agreement in advance of a controversy to submit all questions of law and fact to arbitration is not enforcible, some attributing it to the jealousy of the courts and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction, and others to an aversion, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizen is renounced (*Canal Co. v. Coal Co.*, 50 N. Y., 258), but the tendency of the later decisions is to relax the rule.

In the case from New York, the Court says:

"An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defense to an action. But when the parties stand on an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign, at this day, any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova,* I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. . . . The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law; and the rule is essentially modified and qualified."

This is in line with the statement of *Chapman, J.,* in *Hood v. Hartshorn,* 100 Mass., 117, that "judicial tribunals are provided by the Government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection," and with the remark of *Pollock, B.,* in *Dawson v. Fitzgerald,* 1 Ex. D., 257, that "it has been shown, not only by decision, but by the legislation of late years, that the same pious reverence is not felt for litigation in an open court that was felt in the olden time."

There would appear to be some contradiction for the same Court to say that "The settlement of controversies by arbitration is looked on with great favor by the courts" (*Hurdle v. Stallings,* 109 N. C., 6), and then refuse to permit the members of an organization to agree upon a plan for determining when a member is able to return to his work.

The rule as to agreements to arbitrate has been modified from time to time until now it is generally accepted that it is competent to contract that the amount of damages which may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement.

In the leading English case of *Scott v. Avery,* 5 H. L., 811, it was held that a provision of a mutual insurance company was valid, "that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee; but if a difference should arise between the insurer and the committee, 'relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance,' the difference was to be referred to arbitration," and *Lord Coleridge* thus speaks of this provision: "The principle of law which is relied on by the plaintiff in error is agreed on. The difference between the parties is upon the question whether it governs the present case, and this must be decided by determining the true construction of the agreement. If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not may well be questioned; but it has been so long settled that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts."

Again, it is said in *Assurance Co. v. Hall,* 112 Ala., 323: "The principle is that when the agreement to arbitrate includes the whole subject-matter of difference, so that the right of the party to resort to the courts of his country for the determination of his suit or claim is absolutely and effectually waived, such an agreement is against public policy and void. We adhere to that conclusion. The courts clearly distinguish between an agreement which refers to arbitration the extent or amount of damages to be recovered, but leaves the parties free to have the right to recover or liability of the other party determined by the courts, and those agreements which refer to arbitration the authority to determine the right of the one to recover or the liability of the other. The former are upheld and enforced, while the latter are declared to be against public policy and not binding."

In *Holmes v. Rickett,* 56 Cal., 313, the case from New York (*Canal Co. v. Coal Co., supra*) and *Scott v. Avery, supra,* are cited with approval, and particularly the statement in the latter case: "But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts."

The original doctrine, with its modifications, is well summed up by *Justice Manning* in *Kelly v. Trimont Lodge,* 154 N. C., 100: "Our Court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer," citing *Mfg. Co. v. Assur. Co.,* 106 N. C., 28; and in *Braddy v. Ins. Co.,* 115 N. C., 354, *Justice Avery* says the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid.

Under these authorities, and particularly under the declaration of our own Court, and treating the agreement as one for arbitration, pure and simple, the defendant might well contend that its liability to pay benefits being admitted, when the plaintiff is under disability, that it was competent for the parties to agree in advance that the single fact of disability should be determined by arbitration.

But the case is stronger for the defendant than this, as the plaintiff has voluntarily submitted his claim to the arbitrament of the advisory committee, and an award has been rendered against him.

The authorities seem to agree that although an agreement to arbitrate the entire controversy is not enforcible, and that prior to the award either party may revoke the agreement, that if he fails to do so, and enters upon the arbitration, and an award is made, he is bound.

In *Tobey v. Bristol,* 23 Fed. Cases, 1321, *Judge Story,* after discussing the power of revocation, says: "But where an award has been made before the revocation, it will be held obligatory, and the parties will not be allowed to revoke it, and the courts of law, as well as of equity, will enforce it."

The same principle is declared by *Justice Walker* at the last term, in *Williams v. Mfg. Co.,* 154 N. C., 208, in which he says: "After the arbitrators have acted and rendered an award, the case is very different. Their decision (that of the arbitrators) is binding upon the parties, and can be successfully impeached only upon the grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is uniformly recognized by the authorities."

Nor can the plaintiff now object that the members of the advisory committee were interested, or partial, if such is the fact, because he knew how it was constituted when he became a member of the department, and at the time he submitted his claim to them.

As was said by *Justice Shepherd* in *Pearson v. Barringer,* 109 N. C., 398: "It is well settled that parties 'knowing the facts may submit their difference to any person, whether he is interested in the matters involved (*Navigation Co. v. Fenton,* 4 W. and S. (Pa.), 205), or is related to one of the parties; and the award will be binding upon them.' (6 Wait's Act. and Def., 519; Morse on Arbitration, 105.) But if the submission is made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts; and if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as a waiver, and the award will not be disturbed. *Davis v. Forshee,* 34 Ala., 107. 'A party,' says Morse on Arbitration (*supra*), 'will not be allowed to lie by after he has attained the knowledge and proceed with the hearing without objection, thereby accumulating expense and taking the chance of a decision in his favor, and then, at a later stage, or after a decision has been or seems likely to be rendered against him, for the first time produce and urge his objection.' From these and other authorities it would seem clear that when one seeks to impeach an award he must show that he made objection as soon as he discovered the disqualifying facts."

If, therefore, we applied the rules governing arbitration and awards, we would hold upon the facts in this record that it was competent for the parties to agree in advance to submit to arbitration the single question of the ability of the plaintiff to return to his work, and that an award rendered on such an agreement would be valid, when free from oppression or fraud.

The rights of the parties cannot, however, be determined strictly upon the principle governing arbitrations, because the plaintiff acquires his right to the benefits he claims under the rules of the relief department, and he has by contract attached to the enjoyment of these benefits the condition that he will abide by all reasonable regulations.

There is no question of negligence involved, and the plaintiff does not say that the provisions of the relief department are against public policy and void. On the contrary, he demands relief because he is a member of the department and under its provisions. He says that, having contributed dues amounting to $6.15 before he was accidentally injured, and having received benefits amounting to $673.50 on account of his injuries, that when the department, upon an appeal by him, in accordance with the by-laws, decides that he is able to return to work, he may refuse to do so, and that the regulations providing for a tribunal to decide this single question has no binding force.

The authorities upon this question are in much conflict. All seem to agree that when the regulation of an organization relates to its internal policy, or to a question of membership, that the action of the organization, according to the regulations, is, in the absence of fraud, conclusive; but there is a difference of opinion as to what is a property right and as to the effect of the regulation when a property right is involved.

Some courts hold that when a property right is involved, the member must first seek redress inside of the order, and that, having done so, he may then resort to the courts. Others hold that if there is no inhibition against resorting to the courts, he may do so in the first instance. Others, that he must resort to the order first, if the regulations so require, and then to the courts, although the regulations say that the decision by the tribunal in the order shall be final. And others, that the decision rendered according to the regulations of the order is final and conclusive. *Vandyke's case,* 3 Whar. (Pa.), 312; *Barker v. Great Hive,* 135 Mich., 499; *Von Poucke v. St. Vincent,* 63 Mich., 381; *Ry. Ben. Assn. v. Robinson,* 147 Ill., 159; *Cotter v. A. O. U. W.,* 23 Mont., 90; *Loeffler v. M. W. of Am.,* 100 Wis., 85; *Rood v. Ry. Ben. Assn.,* 31 F. R., 62; *Osceola Tribe v. Schmidt,* 57 Md., 105; *Anacosta Tribe v. Murbach,* 13 Md., 91; *Sanderson v. Railroad Trainmen,* 204 Pa. St., 183; *Robinson v. Templar Lodge,* 117 Cal., 371; *Lodge A. O. U. W. v. Grogan,* 44 Ill., 111; *Knights of Pythias v. Wilson,* 66 F. R., 785.

In *Vandyke's case* the charter of a private corporation provided that if any member should be found breaking the rules of the society he should be served with a notice to attend to answer at the next stated meeting, after which a decision should be made by ballot, and if two-thirds considered him guilty, he should be dealt with agreeably to the by-laws. The by-laws provided that no member should be entitled to receive any benefit from the society whose complaints are the result of intoxication, etc. A member having been expelled by the requisite majority, on the ground of intoxication, after due notice, etc., he brought an action in the court of common pleas to recover the allowance granted to disabled members, and it was held that the regularity of the proceedings to expel him could not be inquired into in that action, and that the court had no jurisdiction to compel payment of the allowance.

Chief Justice Gibson, who wrote the opinion, says: "Into the regularity of these proceedings it is not permitted us to look. The sentence of the society, acting in a judicial capacity and with undoubted jurisdiction of the subject-matter, is not to be questioned collaterally, while it remains unreversed by superior authority."

It will be noted that in this case the tribunal provided in the order decided the question of intoxication; and its decision was held to be conclusive, and upon it the right to benefits was denied.

In *Sanderson v. Brotherhood of Trainmen, supra,* speaking to the same question, the Court says: "In the case at bar the plaintiff's statement clearly shows that the constitution of the order provides a tribunal to decide the very question now in controversy in this case, to wit, whether or not the plaintiff's claim amounted to total disability. In accepting the certificate the plaintiff agreed, with the other members of the beneficial order, that he would submit this question to the tribunal so constituted. It was a tribunal of his own choice. It was doubtless provided for the express purpose of preventing litigation and thereby to prevent the funds of the order from being taken and used in defending suits. It is to the interest of every member of the order that this regulation should be enforced. In our opinion, the decision of such tribunal is conclusive upon the plaintiff, and the merits of the decision of such tribunal cannot be inquired into collaterally, either by action at law or any other mode."

In the case of *Anacosta Tribe of Red Men, supra,* the right of a member to sick benefits was involved, and after a decision against him in the order, he brought action to recover the benefits. The Court says: "The appellee, by becoming a member, assented to be governed by the Tribe and Council, according to the regulations, and it follows that he was bound by their application and construction in his own case. It is provided that the Tribe shall determine matters of this kind, and the decision, on appeal, made final. These are private beneficial institutions operating on the members only, who for reasons of policy and convenience, affecting their welfare and perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them assents. They require the surrender of no right that a man may not waive, and are obligatory on him only as long as he chooses to recognize their authority. In the present instance the party appears to have been subjected to the general laws and by-laws according to the usual course, and if the tribunal of his own choice has decided against him, he ought not to complain. It would very much impair the usefulness of such institutions if they are to be harassed by petty suits of this kind; and this, probably, was a controlling consideration in determining the manner of assessing benefits and passing upon the conduct of members. The very point arose in *Vandyke's case,* 2 Whar., 309, where (*Gibson, Ch. J.,* delivering the opinion of the Court) it was held that an action did not lie to recover benefits, upon grounds that we deem altogether satisfactory."

This and *Vandyke's case* were approved in *Osceola Tribe v. Schmidt,* 57 Md., 105.

In *Van Poucke v. St. Vincent Society, supra,* plaintiff sued the defendant, a mutual benefit and coöperative insurance company of which he was a member, for money claimed to be due him for a "sick benefit." The by-laws of the company provided for a "sick committee," whose duty it should be to *investigate* and *determine* whether a member was entitled to such benefit, whose decision was to be final, and the committee to be *sole "deciders"* of the question. After plaintiff had received assistance for a time, he was cited before the committee, and after a hearing they decided that he was *not* entitled to receive any *further* benefits on account of his injury, of which decision he was duly notified, and it was held that the action of the committee was final, the Court saying: "It is necessary that there should be some mode of determining the question of when relief should be given and denied, and the method provided in the by-law seems well adapted to the circumstances and needs of such society. There is nothing oppressive in the terms of the by-law, and it contains nothing which the policy of the law forbids. If it is enforced in good faith and with impartiality, which the members pledge themselves to do, it must result in benefit to sick members, and at the same time protect the funds of the society from depletion by the undeserving."

The same principle is declared in *Barker v. Great Hive,* 135 Mich., 502.

The question was considered by the Circuit Court of Appeals in *Knights of Pythias v. Wilson, supra,* and it was there declared: "The decided weight of authority is that a member of a mutual benefit society must resort, for the correction of an alleged wrong done to him as such member, to the tribunals of the society, and when the proceedings are regular, the action of the society is conclusive, and cannot be inquired into collaterally."

We will not quote further from the cases cited, and there are others to the same effect, but they sustain fully the contention of the defendant, that it was the duty of the plaintiff to seek redress inside the department, and that the decision of the advisory committee, upon his appeal, is conclusive upon him.

The doctrine seems to us to be reasonable and just, and necessary to the maintenance, in benefit societies and fraternal orders, of provisions conferring benefits on sick or disabled members.

If it should be held otherwise, such societies would be subjected to litigation each time a member was dissatisfied, and funds raised for wise and beneficent purposes would be wasted.

This is not in conflict with the opinion in *Kelly v. Trimont Lodge,* 154 N. C., 98. In that case it is stated that the plaintiffs were entitled, under the rules and regulations, to the sum demanded, and the defendant denied the right of action. It was held that an agreement to submit the whole controversy to arbitration was not binding; but it is distinctly stated that it was competent to agree that the decision of a single fact, such as we have here, could be submitted to a tribunal within the order.

When a member submits his claim to the committee he is entitled to a hearing, and is not concluded by its action if it is fraudulent or oppressive, of which the facts on this record furnish no evidence.

There was error in refusing to give the instruction requested by the defendant, and a new trial is ordered.

New trial.

CLARK, C. J., concurring in result: This is not the usual case in which this defendant is setting up its so-called Relief Department as a defense in an action for damages for death or personal injuries caused by the negligence of the railroad company. But I cannot agree that the Relief Department of the defendant railroad in any particular resembles a fraternal order or a mutual benefit society. It is neither fraternal nor mutual.

In a fraternal order the members enter voluntarily; they prescribe the rules and regulations; the funds are managed by committees and officers appointed by themselves, and the rules and officers can be changed at their will. In this Railroad Relief Department the members are compelled to enter or lose their employment with the corporation. The committees are appointed and the rules and regulations are prescribed, not by the members, but by the employer, and can be changed by the latter only and at its will. The sole management is in the employer, who contributes none of the funds, but has sole charge and disposal of them, without responsibility to those who create the fund.

The motive in organizing this Relief Department is therefore totally dissimilar from the reasons which cause the organization of fraternal or mutual benefit societies. There is nothing which makes the latter a violation of law. That the existence of this Relief Department is in violation of both State and Federal statutes passed for the protection of railroad employees has already been stated in my opinion in *King v. R. R., ante,* 44, with my reasons for so holding, which need not be repeated here. This so-called "Relief Department" is wholly and simply an ingenious device to relieve this railroad company of liability under the State and Federal "Fellow-servant Law" or "Employer's Liability" act, and throw all liability for negligence upon the employees themselves by means of a relief fund which they are forced to raise out of their own wages.

J. C. CURRIE ET AL. v. GOLCONDA MINING AND MILLING COMPANY ET AL.

(Filed 27 November, 1911.)

1. **Judgments—Motion to Set Aside—Excusable Neglect.**
Upon motion to set aside a judgment on the ground of excusable neglect, by nonresident defendants, it must appear that the motion was made within twelve months from the rendition of the judgment.

2. **Judgments—Parties—Not Resident—Motion to Set Aside—Interpretation of Statutes.**
A judgment obtained upon service by publication of summons will not be set aside under the provisions of Revisal, sec. 449, upon motion made by defendant more than twelve months after its rendition.

3. **Judgments—Irregular—Definition.**
An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside, upon motion, within a reasonable time when a meritorious defense is shown.

4. **Process—Service—Nonresidents—Publication—Statutes—Constitutional Law.**
Revisal, sec. 1243, providing for personal service of summons on corporations "having property or doing business in this State," by leaving a true copy of the summons with the Secretary of State, is constitutional and valid.

5. **Process, Returnable—Nonresidents—Publication—Procedure.**
It is not required as to the validity of the service of a summons by publication and attachment on property within the State that the action be commenced within thirty days from the time of issuing the summons, or that service be completed ten days before the return term.

6. **Pleadings—Verification—Substantial Compliance.**
It is not necessary to the regularity of the verification of a complaint that it be subscribed by the party making it, and a substantial compliance is sufficient, and meets the requirements when it appears therefrom that the plaintiff swore to the complaint before an officer authorized to administer oaths.

7. **Pleadings—Judgment by Default—Promise to Pay.**
When personal service on defendant has been properly made, a judgment by default for want of an answer may be obtained at the return term, if the complaint alleges an express promise to pay a certain sum due.

8. **Nonresidents—Process—Service by Publication—Personal Judgment—Proceedings in Rem.**

A judgment against a nonresident defendant by publication of service is invalid when he has no property in the State subject to attachment; and if he has such property, which has properly been attached, no personal judgment may be rendered against him in the absence of personal service, the proceedings being *in rem,* leaving the judgment to be satisfied only to the extent of the proceeds of sale of the property attached.

9. **Process—Service by Publication—Personalty—Nonresidents—Interpretation of Statutes.**

When there is service by publication on two nonresident defendants, one of whom has lands in the State subject to attachment, and owes the other defendant a part of its purchase price, the debt owed is not such an interest in the property as comes within the meaning of Revisal, sec. 1243, providing for service of summons by publication, as it is personalty in the hands of creditor beyond the borders of the State.

10. **Pleadings—Definiteness—Judgment by Default.**

A pleader desiring a judgment by default final must set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation of his complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular.

11. **Process—Publication—Attachment—Property—Debt—Status.**

A judgment by default final against two nonresident defendants, A and G, will be set aside for irregularity when it appears from the complaint that A had no property within the State, and the ground of relief is based upon an alleged assignment by A to the plaintiff of a debt for the purchase money of lands situated here, against which an attachment has been sued out, without allegation that G knew of its assignment, or of the status of the debt owed by A or of what disposition had been made of it, the liability of G being determined as of the time of the levy of the attachment, and the allegations therefore not being sufficiently definite.

12. **Judgments — Irregularities — Attachment—Sale—Innocent Purchaser for Value—Procedure.**

When judgment by default final and attachment on his lands has been set aside against a nonresident defendant for irregularity, and the property seized under the attachment has been sold and deed made to a purchaser who is not a party to the motion, the action of the court in setting aside the judgment will not prejudice his rights; but he should be made a party; and if it is found that he is an innocent purchaser for value, *semble*, that the judgment may be set aside as between the parties and retained for his protection.

13. **Same.**

In this case the fact that the defendant, the president and the corporation, both nonresidents, upon whom judgment by default for want of an answer had been obtained upon service of summons by publication, knew of the pendency of the action before judgment was rendered, and that neither moved in the matter for more than twelve months thereafter, would have an important bearing upon the rights of a party to whom a deed to the attached lands in controversy had been made, and who claimed as an innocent purchaser for value.

14. **Nonresidents — Judgment Set Aside — Request to Plead — Appearance.**

A request of nonresident defendants to answer the complaint, in their application to have a judgment set aside for irregularities, is equivalent to a general appearance.

APPEAL from *Daniels, J.*, from judgment rendered 21 August, 1911, from MONTGOMERY.

This is a motion to set aside a judgment for irregularity.

The summons was issued on the 3d day of March, 1910, against the Golconda Mining and Milling Company and O. M. Allen, Jr. Both defendants were nonresidents, and, as far as the record discloses, the only property owned by the said Allen is a debt of $18,000 due him by said Golconda Company, which is a corporation owning property in this State, but not doing business therein when the action was commenced.

A warrant of attachment was issued at the time of the issuing of the summons, and the return thereon shows that it was levied on said debt of $18,000 and on the property of said corporation. A copy of the summons against the Golconda Company was left with the Secretary of State, in accordance with Revisal, sec. 1243, on 19 March, 1910. An order of publication of summons and of the attachment was procured against both defendants on 15 March, 1910. The publication began on 24 March, 1910, and was continued once a week for four weeks, the last publication being on 14 April, 1910.

The term of court at which the judgment was rendered began on 18 April, 1910. Within the first three days of said term the plaintiffs filed their complaint, with the following form of verification thereon:

"J. C. Currie, one of the plaintiffs, being duly sworn, deposes and says that the foregoing complaint is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those he believes it to be true.

"Witness my hand, this 18th day of April, 1910.

"HIRAM FREEMAN,
"Justice of the Peace."

They allege as to the defendant Allen a promise to pay them $5,000 as the purchase price of certain property, on certain conditions, and that the conditions have been performed.

They also allege that said property was sold by said Allen to the Golconda Company, and that it is indebted to him in the sum of $18,000 for the same, and that the purchase price of $5,000 agreed to be paid by the defendant O. M. Allen, Jr., to the plaintiffs for their interests in the tracts of land aforesaid was included in the $18,000 agreed to be paid by the defendant the Golconda Mining and Milling Company to the said Allen for the purchase price of said tracts of land; and the said Allen in securing said agreement from the defendant the Golconda Mining and Milling Company to pay the $18,000 purchase price of said property, became the agent or trustee of the plaintiffs to the extent of $5,000 of said purchase price agreed to be paid by the defendant the Golconda Mining and Milling Company for said property, and said indebtedness of the defendant the Golconda Mining and Milling Company to the defendant O. M. Allen, Jr., was contracted for the benefit of the said plaintiffs to the extent of $5,000 of said $18,000, and in pursuance of the agreement hereinbefore alleged and the agreement referred to herein as Exhibit "A"; and the defendant the Golconda Mining and Milling Company thereby became liable to the plaintiffs in the said sum of $5,000 for the purchase price of the interests of the plaintiffs in and to the lands and property hereinbefore set forth.

That thereafter the defendant O. M. Allen, Jr., pursuant to the agreement hereinbefore set forth, assigned, transferred, and set over to the plaintiffs the indebtedness due from the defendant the Golconda Mining and Milling Company to the defendant O. M. Allen, Jr., for the purchase price of said tracts of land, as aforesaid, to the extent of $5,000 thereof, with interest on the same, and the said the Golconda Mining and Milling Company and O. M. Allen, Jr., are due and owing to the plaintiffs the said sum of $5,000, with interest thereon from 19 January, 1904, until paid.

Upon the hearing of the motion, the following judgment was rendered:

"This cause coming on to be heard upon the motion of the defendants to set aside the judgment rendered herein at April Term, 1910, of Montgomery Superior Court, and being heard upon the complaint and affidavits filed by the parties, the court finds the following facts:

First. That judgment by default final was rendered in this action at April Term, 1910, of said court, and that motion to set aside the said judgment was made, returnable to July Term, 1911, of said court, and the said motion was continued by consent and heard at Lexington in the county of Davidson on this the 21st day of August, 1911.

Second. That service of summons in the case was made upon the defendants through the Secretary of State and also by publication, but publication of summons and notice of attachment by publication were begun immediately after the summons issued, and not after thirty days from the issuing of said summons.

Third. That the plaintiffs, at the return term of the summons in this action, offered testimony as to the proof of the claims set up in the complaint.

Fourth. That the defendants have a good and meritorious defense to the action of the plaintiffs.

Fifth. That as to the first cause of action, the complaint does not set forth a contract between the plaintiffs and the defendant corporation with sufficient definiteness and certainty and of the nature and character required by the statute for the rendition of a judgment by default final at the return term.

Sixth. That the defendant O. M. Allen, at the time referred to in the complaint after the organization of the defendant corporation, was the president of said corporation.

Seventh. That as to the first and second causes of action, the complaint sets forth a contract between the plaintiffs and the defendant O. M. Allen, Jr., with sufficient definiteness and certainty and of the nature and character required by law for the rendition of a judgment by default final as against said defendant Allen.

Eighth. That April Term, 1910, of Montgomery Superior Court began on 18 April, 1910.

Tenth. That this action was begun in the Superior Court of Montgomery County, North Carolina, on 3 March, 1910, the summons issued therein being returnable to April Term, 1910, of said court, the summons in said case being issued both to Montgomery County and to Wake County; that the summons issued to the Sheriff of Montgomery County was returned, "No officer or agent of the defendant the Golconda Mining and Milling Company, upon whom process against the defendant can be served, can be found in Montgomery County," and summons issued to the Sheriff of Wake County was served by the sheriff of said county on 19 March, 1910, as shown by the return thereon made by leaving a true copy of the summons with J. Bryan Grimes, Secretary of State of the State of North Carolina, and by paying him 50 cents at the instance of the plaintiffs in said cause; that upon affidavits made as shown by the judgment roll in said action, the summons and notice of the issues of the warrant of the attachment therein was also served by publication, as shown by said judgment roll, and a warrant of attachment was issued against said defendant the Golconda Mining and Milling Company, on 16 March, 1910, which said warrant was on 17 March, 1910, levied by the Sheriff of Montgomery County upon the property described and referred to in the judgment rendered in this cause and the complaint herein filed, and that thereafter and within five days from said levy, said levy was certified by the said sheriff to the Clerk of the Superior Court of Montgomery County, and the same was docketed on the judgment docket of said court, as shown by the judgment roll in this action; that within the first three days of the April Term, 1910, of the Superior Court of Montgomery County, it being the term to which said summonses were returnable, the plaintiffs filed the complaint appearing in the judgment roll and record, and there was no answer filed to the same during said term; that the plaintiffs moved for judgment upon said complaint by default for want of an answer immediately before the adjournment of said April Term, 1910, of said court, and offered evidence to establish the claims and demands of the plaintiffs, and the judgment appearing in the judgment roll in this cause in favor of the plaintiffs and against the defendants was rendered by the court at said term.

Eleventh. That the Golconda Mining and Milling Company, defendant, is a foreign corporation, created and organized under the laws obtaining in the District of Columbia, in the United States, and on or about 11 September, 1905, became the owner of the real estate described in the complaint in this cause, by a deed executed to it by the defendant Oscar M. Allen, Jr., and his wife, Lucile D. Allen, which said deed was, after probate, recorded in the office of the Register of Deeds of Montgomery County in Book of Deeds, No. 43, at page 490; that thereafter the said defendant the Golconda Mining and Milling Company began to do business in the county of Montgomery in the State of North Carolina, and purchased certain machinery and proceeded to make certain excavations and sink certain shafts upon the real estate aforesaid, referred to, and operated its property for the purpose of mining for gold and other minerals thereon, and continued to operate said mine and engage in business, as aforesaid, in said county of Montgomery and State of North Carolina, until about the year 1907, when it ceased to operate its mine and discontinued the working and development of its mine and property, and has not worked or operated the mine and property, and has not worked or operated the mine since the year of 1907, and has not, since that time, worked or developed said mine to any extent whatever; that the said defendant the Golconda Mining and Milling Company has at no time filed in the office of the Secretary of State of the State of North Carolina a copy of its charter or articles of agreement, attested by its president and secretary under its corporate seal, and a statement, attested in like manner, of the amount of its capital stock authorized, the amount actually issued, the principal office of this corporation in this State, and the name of the agent in charge of said office, the character of the business which it transacts, and the names and post-office addresses of its officers and directors, as required by law, and has not, since the year 1907, had an officer or agent in the State of North Carolina upon whom process in all actions or proceedings against it can be served, as required by law.

Twelfth. That the defendant the Golconda Mining and Milling Company had actual knowledge of the bringing of this action for some time prior to the taking of the judgment herein at the April Term, 1910, of the Superior Court of Montgomery County, and said defendant had actual knowledge of the judgment so rendered herein at said April Term, 1910, for more than one year before serving the notices in this cause, that it would move to set aside said judgment, and before making said motion.

Thirteenth. That the complaint appearing in the judgment roll and record was actually sworn to by J. C. Currie, one of the plaintiffs, as set forth in the affidavit attached to the complaint, on the day it bears date, before Hiram Freeman, a justice of the peace of Montgomery County, North Carolina, who was duly authorized to administer such oath shown by affidavits filed upon the hearing of this motion, but at the time judgment by default was rendered no certificate or jurat appeared to the verification, except what appears on the face of the complaint.

Fourteenth. That since the rendition of the judgment herein at April Term, 1910, of the Superior Court of Montgomery County, execution duly issued thereon, and by virtue thereof the Sheriff of Montgomery County, to whom said execution was issued and delivered, sold the real estate described in the complaint in this cause pursuant to the mandate of said execution and deed made to the purchaser.

Fifteenth. That the Pittman-McDonald and Black warrantee deeds, referred to in Exhibit "A," attached to the complaint, were actually executed and delivered to O. M. Allen, Jr., and conveyed the lands referred to in said contract.

Upon the foregoing findings of fact the court adjudges that the judgment by default final rendered in this cause was and is irregular and not taken according to the regular course and practice of the court, and the said judgment is hereby set aside and the defendants allowed to answer the complaint.

The plaintiff excepted and appealed.

U. L. Spence for plaintiff.

T. J. Jerome and J. A. Spence for defendant.

ALLEN, J. The defendants are not entitled to relief on the ground of excusable neglect, because the motion was not made within twelve months from the rendition of the judgment (*Clement v. Ireland,* 129 N. C., 220; *Ins. Co. v. Scott,* 136 N. C., 157), nor under Revisal, sec. 449, allowing a defendant against whom a judgment has been rendered, upon service by publication, to defend after judgment, upon good cause shown, because more than twelve months had elapsed after notice of the judgment before any notice of the motion issued.

They must, therefore, rely upon the right to have the judgment set aside upon the ground that it is irregular.

An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside within a reasonable time, and upon showing a meritorious defense. *Scott v. Life Association,* 137 N. C., 520.

We must then inquire into the regularity of the proceeding.

The summons was duly served on the corporation under section 1243 of the Revisal, and also by publication.

The section of the Revisal referred to provides for personal service of corporations "having property or doing business in this State," by leaving a true copy of the summons with the Secretary of State, and it appears that the Golconda Company had property in the State, and that a copy of the summons was left with the proper officer on 19 March, 1910.

A statute similar to this has been held valid. *Fisher v. Ins. Co.,* 136 N. C., 222.

The publication of the summons and attachment was not irregular, because commenced within thirty days from the time of issuing the summons (*Best v. British and Am. Co.,* 128 N.

C., 351; *Grocery Co. v. Bag Co.,* 142 N. C., 174, the last case overruling *McClure v. Fellows,* 131 N. C., 509), and it was not necessary that the service thereof should be complete ten days before the April term of court. *Guilford County v. Georgia Co.*, 109 N. C., 310.

The same principles apply to the service by publication on the defendant Allen, except in one particular, to which we will hereafter refer.

The verification of the complaint is a substantial compliance with the statute, and it sufficiently appears that the plaintiff was sworn, and by an officer authorized to administer oaths. It was not necessary that it should be subscribed. *Alford v. McCormac,* 90 N. C., 151.

As against the defendant Allen, the complaint alleges an express promise to pay a sum certain, and if there had been personal service of summons, the plaintiff would have been entitled to judgment by default final against him. *Hartman v. Farrier*, 95 N. C., 178; *Scott v. Life Association*, 137 N. C., 522.

There was, however, no personal service on him, and as he was a nonresident, jurisdiction could only be had by levying the attachment on property belonging to him in this State, and when thus obtained, it would not authorize a personal judgment against him. *Winfree v. Bagley,* 102 N. C., 515; *Goodwin v. Claytor,* 137 N. C., 230; *May v. Getty,* 140 N. C., 318; *Lemly v. Ellis,* 143 N. C., 213.

These cases fully sustain the propositions that, in the absence of an attachment levied upon property of a nonresident within the State, that an attempt at service by publication is ineffective for any purpose, and that "the court acquires jurisdiction where an attachment has issued or the *res* has otherwise been brought within its control only to the extent that the *res* will satisfy the plaintiff's recovery, and no general or personal judgment will be binding beyond that." *Lemly v. Ellis, supra.*

Applying these principles to the judgment against the defendant Allen, it must be held to be irregular, because a personal judgment was rendered against him, which might, however, be treated as an adjudication of the amount found to be due, and not a judgment for its recovery (*Goodwin v. Claytor,* 137 N. C., 230), and for the further and stronger reason that the attachment was not levied on any property belonging to him, situate in this State.

It is not alleged that the defendant Allen has any interest in the property of the Golconda Company, and the only property *belonging to him,* referred to in the attachment, is the debt of the company to him.

He and the company are outside the State, and nonresidents, and the debt cannot be property of his in this State.

The case of the Golconda Company rests on different facts. The summons as to this defendant was served by leaving a copy with the Secretary of State, and also by publication, and the attachment was levied on property of the defendant in this State.

If, then, the complaint is sufficient to sustain a judgment by default final, the judgment as to this defendant is regular, and otherwise not.

As was said in *Junge v. McKnight,* 137 N. C., 286: "The plaintiff must be careful to draw his judgment, when by default final, according to the right arising upon the case stated by the complaint, 'because the defendant is concluded by the decree, so far at least as it is supported by the allegations of the bill.' If the decree or judgment do not conform to this well-settled principle, if it give relief in excess of or of a different character from that to which the plaintiff is entitled upon the allegations of fact in the complaint, the court will promptly set it aside upon application. It thus becomes important that the pleader, when he wishes to take a judgment by default final, set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, so that the court may, upon an inspection of his complaint, adjudge his rights to correspond with such facts."

The complaint alleges a promise upon the part of Allen to pay the plaintiffs $5,000 upon certain conditions, and that the conditions have been performed; that the defendant the Golconda Company has promised to pay the said Allen $18,000, under a contract made for the benefit of the plaintiffs, to the amount of their debt; and that the said Allen has assigned to the plaintiffs said debt to the extent of their claim against Allen, but it does not allege any promise, upon the part of the Golconda Company, to pay the plaintiffs any sum, or that it had notice of the assignment to the plaintiffs. If so, the amount for which the Golconda Company would be liable to the plaintiffs is, of necessity, uncertain, as the debt to Allen was contracted in 1906, and under the facts stated its liability would be determined as of the time the attachment was levied.

The contract between the said Allen and the other defendant is also made a part of the complaint, and it appears from an inspection of it that provision was made therein for the payment of said sum of $18,000, and there is no allegation as to what was done under it.

If the amount for which the defendant would be liable is not made certain by the complaint, the plaintiffs were not entitled to judgment by default final therein, and such judgment is irregular. *Witt v. Long,* 93 N. C., 390; *Battle v. Baird,* 118 N. C., 854; *Jeffries v. Aaron,* 120 N. C., 169; *Stewart v. Bryan,* 121 N. C., 46.

We conclude, therefore, that there is no error in the judgment rendered; but we note that the property seized under the attachment has been sold, and a deed made to the purchaser, who is not a party to this motion, and will not be prejudiced thereby. If he is an innocent purchaser for value, it may be that the judgment would be set aside as between the parties, and retained for his protection, as was done in *Harrison v. Hargrove,* 120 N. C., 96; and in determining his rights, the fact that Allen was president of the Golconda Company, which appears from affidavits on file, and that both defendants knew of the pendency of the action before the judgment was rendered, and that neither moved in the matter for more than twelve months, would have an important bearing. It is advisable that he be made a party.

The defendants, Allen and the Golconda Company, in their application to have the judgment set aside, asked to be allowed to answer, and this is equivalent to a general appearance by both. *Scott v. Life Association,* 137 N. C., 515.

Affirmed.

MRS. BELLE McGHEE PHIFER v. W. W. PHIFER.

(Filed 27 November, 1911.)

1. **Wills—Trusts and Trustees—Equitable Estates—Execution of Trusts—Dower—Demurrer.**

The widow is not entitled to dower in an equitable interest in lands of her husband, which is subject to certain trusts and changes, until they are satisfied; and, hence, unless it appears in the widow's proceedings for dower that they have been satisfied, a demurrer thereto will be sustained.

2. **Same.**

A testatrix who had received a life estate from her father in a certain amount, with limitation over to her children, by her will declared that advances had been made from the trust estate to two of the children, R being one of them, and, subject to the debts of the testatrix and to these advances, the said amount was to be equally divided among her children. It also appeared from the will that a part of the trust property had been given in part payment of a certain tract of land which the owner had contracted to convey to her. The widow of R claiming dower in certain of the lands, without allegation in the petition as to what had been done under the will, or that the trusts had been closed: *Held*, neither R nor his widow could have an estate in possession until these trusts and charges were satisfied, and that the widow of R consequently was not entitled to dower, upon the face of the petition, and hence a demurrer thereto should be sustained.

3. **Same—Active Trusts—Account.**

A will declaring a life estate in one of certain trustees, with a limitation over to the children of testatrix after discharging certain debts and the execution of certain trusts, declares an active trust, and vests no estate in the children until the execution of the trusts; but a mere right to have the trusts executed and the accounts stated, and there would, until then, be no seizin in one of the children of lands from which his widow's dower could be assigned.

4. **Dower — Equitable Estates — Seizin of Husband — Personalty—Trusts and Trustees—Advancements—Distribution.**

An estate in lands of a deceased husband from which his widow's dower may be assigned, whether legal or equitable, must be one of which the husband was seized. *Semble*, in this case, the will should be construed that the land be sold and the proceeds divided, and therefore the interest of the husband would be personalty; that advancement had been made to the husband of more than his share of the fund; that the trustees were to divide the fund after certain children had been made to account for advancements, and *Patton v. Patton*, 60 N. C., 574, applied.

APPEAL from *W. J. Adams, J.*, at July Term, 1911, of MECKLENBURG.

This is a proceeding for the allotment of dower, the petitioner claiming as the widow of R. S. Phifer, who was one of seven children of M. M. Phifer.

The petitioner claims that her husband was seized of an estate of inheritance, legal or equitable, under the will of his mother, and her counsel says, in his brief, that her right depends on the construction of said will, and of two papers executed by the said R. S. Phifer, which are as follows:

I, Mary Martha Phifer, wife of William F. Phifer, being the equitable owner of certain real estate acquired by me by virtue of a contract of purchase thereof with Joseph H. Wilson, for which I hold his contracts in writing for the purchase of said property, which contracts are now in my possession, and upon which contracts of purchase a part of the purchase money has been paid and a part thereof is still owing to said Wilson, and being desirous of making disposition of my estate therein by last will and testament, do hereby make, publish, and declare this instrument of writing to be and contain my last will and testament, hereby revoking and declaring void all wills and writings in the nature of a will heretofore made by me, as explanatory of my will hereinafter contained, I declare that I have received an estate under the last will and testament of my father, W. E. White, deceased, of the value of $10,000, which estate by virtue of said will (which is on file in the office of the judge of probate of said county) was bequeathed to me for my sole, separate, and exclusive use during the term of my life, and at my death to be equally divided among my children, as will more fully appear by reference to said will. And whereas I have heretofore advanced to my sons, William W. Phifer and Robert S. Phifer, respectively, of said trust fund the following sums, to wit, to said William W. Phifer thirteen hundred dollars ($1,300), and to said Robert S. Phifer two thousand dollars ($2,000); and whereas my remaining five children, to wit, George M., Maie W., Cordelia W., Josephine H., and Edward W., have received nothing from said source; and whereas I have invested six thousand three hundred dollars ($6,300) of said trust estate, in part payment of the property purchased by me from Joseph H. Wilson, leaving four hundred dollars ($400) of said trust estate which is now in my hands invested in Rutherford County bonds: Now, in view of the premises, I will and devise all my estate to my husband, William F. Phifer, and to my son William W. Phifer, in trust for the purpose hereinafter declared, with power to sell said property, or any portion thereof, either at public or private sale, as in their discretion may seem most judicious, and the proceeds arising therefrom they shall apply:

1. To the payment of the residue of the purchase money due upon the purchase of said property.

2. To the payment of any debt I may owe.

3. The residue of my estate I direct to be divided among all my children above named, subject, nevertheless, to a charge in said division against my son William W. Phifer of $1,300 and a charge of $2,000 against my son Robert S. Phifer, which said sums were advanced to them respectively out of the trust fund received by me from my deceased father; the whole of said residuary estate to be further subject to a charge for the support and maintenance of my husband, William F. Phifer, for and during his life.

4. I hereby constitute and appoint my husband, William F. Phifer, and my son William W. Phifer, executors of this my last will and testament.

In witness whereof I have hereunto set my hand and seal the 11th day of August, 1875.

M. M. PHIFER (SEAL).

GEORGE E. WILSON, S. J. WHITE, witnesses.

This indenture this day made between Robert S. Phifer of the county and State aforesaid, party of the first part, and George M. Phifer of the county of Mecklenburg, State of North

Carolina, party of the second part, witnesseth: That the party of the first part, for and in consideration of the sum of four thousand dollars ($4,000) heretofore paid him by Mrs. M. M. Phifer, and for the further consideration of one dollar ($1) to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has this day bargained and sold, aliened and conveyed, and does by these presents bargain and sell, alien and convey, remise and release unto the said party of the second part all his right, title, and interest, legal and equitable, in and to those certain tracts and parcels of land lying in the county and State aforesaid and described as follows:

Lying on the eastern limits of the city of Charlotte and adjoining the lands of M. M. Orr, Baxter Moore, Hugh Grey, G. D. Parks, W. W. Phifer, and the lands of the First National Bank, containing about one hundred (100) acres, more or less. Also one other tract adjoining the lands of W. W. Phifer, Dr. M. M. Orr, Robert Gibbon, Mrs. Allen William McCarley, James Davis, George Dougherty, Mrs. C. Kyle, W. R. Burwell, and others, containing about one hundred and seventy (170) acres, more or less, and being the tract formerly owned by W. F. Phifer and purchased by Joseph H. Wilson at sheriff's sale and by him conveyed to Mrs. M. M. Phifer.

To have and to hold to him, the same party of the second part, his heirs and assigns forever; and the said party of the first part, for and in consideration aforesaid, does hereby assign and convey to the party of the second part, his heirs, executors, and administrators, all his right, title, and interest in the money, property, or estate bequeathed or devised to him by the will of his grandfather, William E. White, and in any property or funds in which said bequeathed money may have been invested, upon the condition, nevertheless, that the said party of the second part shall hold the above property by this indenture conveyed in trust for Mary W. Phifer, Cordelia W. Phifer, Josephine H. Durant, George M. Phifer, Edward W. Phifer, and W. M. Phifer. The last named party will be charged in the distribution with the sum of $1,300 so expressed and provided in the will of Mrs. M. M. Phifer.

In testimony whereof the party of the second part has hereunto set his hand and affixed his seal, this the 17th day of February, 1881. ROBERT S. PHIFER (SEAL).

Whereas my mother, Mrs. Mary Martha Phifer, received from the estate of her late father, William E. White, an estate in the sum of about $10,000, which said estate was limited by the last will and testament of the said William E. White to her for *sole and separate* use during her life, and at her death to be distributed equally among her children, which said will has been duly admitted to probate in Mecklenburg County; and whereas my said mother has already advanced to me out of said estate so received by her the sum of about.........................dollars, which said sum so received by me and advanced by her is far in excess of the amount to which I am entitled under said will and testament after the life estate of my mother is terminated: Now, for and in consideration of the premises and for the further consideration of the sum of $10 to me in hand paid by the other children of my said mother, the receipt whereof is hereby acknowledged, I have renounced and released, and do hereby renounce and release, all my right, interest, title, and estate in and to the estate thus bequeathed to me by the last will and testament of the said William E. White, which said estate was to come into possession after the death of my said mother.

And I do hereby assign, transfer, and set over all my right, title, interest, and estate in and to the same, to my brothers, William W., George W., Edward White, and to my sisters, Mary W., Cordelia W., and Josephine H., to be divided among them equally, and in the event of the death of either or any of them, then the share of the one deceased to survive to the others.

In testimony whereof I have hereunto set my hand and seal this the 14th day of February, 1879.

(Signed) ROBERT S. PHIFER (SEAL).

There is no allegation in the petition as to what has been done under said will, or that the trusts have been closed, or as to the value of the property bequeathed or devised, or that there is any surplus after paying the residue of the purchase price of the property referred to in the will, and the debts of the testatrix, and accounting for the charge of $2,000 against R. S. Phifer.

The defendants demurred to the petition, which was sustained, and the petitioner excepted and appealed.

W. F. Harding for plaintiff.

Burwell & Cansler, Tillett & Guthrie, Cameron Morrison, and Maxwell & Keerans for defendant.

ALLEN, J. There is no error in the judgment sustaining the demurrer.

If it is assumed that an equitable estate and not a mere right vested in R. S. Phifer under the will of his mother, and that his interest therein was realty, it was, in any event, subject to certain trusts and charges, and neither he nor his widow could have an estate in possession until these trusts and charges were satisfied.

There were seven children of M. M. Phifer, and it clearly appears from her will that, after the payment of certain debts, she desired an equal division among her children, and that R. S. Phifer should have nothing in such division until he had accounted for $2,000 advanced to him.

He had, therefore, no interest in the land, nor in the proceeds of its sale, unless, after the payment of the debts mentioned in the will, and providing for the support and maintenance of the husband of the testatrix, there was a surplus fund of at least $14,000, being $2,000 to each of the seven children; and there is nothing in the petition suggesting that this condition exists. On the contrary, the deed to his mother in 1879, and to his brothers and sisters in 1881, and the fact that thereafter he made no further claim for a period of thirty years, indicate that he had been advanced beyond his proportionate share under the will.

Nor is there any allegation in the petition that any part of the trusts declared in the will have been executed, and that parts of the land remain unsold, or that it was unnecessary to sell to perform the trusts.

If, however, these allegations were made, we would be inclined to adopt the construction of the will contended for by the defendants, and, if so, the relief prayed for would be denied.

An analysis of the will of Mrs. M. M. Phifer shows:

(1) That she received, under the will of her father, William E. White, a trust fund of the value of $10,000, and by the terms thereof she had the use of same during her life, and at her death said fund was to be equally divided among her children.

(2) That out of said fund she advanced to her son Robert S. Phifer, the husband of the petitioner, $2,000; that she invested $6,300 of said trust estate in part payment of the lands devised in her will; that she held certain contracts for the purchase of the lands devised, and at her death all the purchase money had not been paid.

(3) That she bequeathed and devised her estate, both real and personal, to her husband, William F. Phifer, and to her son William W. Phifer, in trust, with power to sell said property or any portion thereof, either at public or private sale, as in their discretion might seem most judicious, and directed that they should apply the proceeds therefrom as follows: (*a*) to the payment of the residue of the purchase money due upon the purchase of said property; (*b*) to the payment of her debts; (*c*) the residue of her estate to be divided among all her children named in the will, subject to a charge in said division against her sons, William W. Phifer of $1,300 and R. S. Phifer of $2,000, advanced to them respectively out of the said trust fund of $10,000 which she received from her father's estate, as set forth in her will; (*d*) she further provided that the whole of her residuary estate was subject to a charge for the support and maintenance of her husband, William F. Phifer, for and during his life.

The estate of the testatrix is devised to her husband and son in trust for certain purposes, and the purposes are declared. This created an active trust, and the title remained in the trustees until the trusts were performed. The children of the testatrix had an interest in the property, but they were not entitled to possession of any part of it, and could not know what they would get until the trusts were closed. If so, it may well be contended that they had no estate, but a mere right to have the trusts executed, and an account stated, and in that event there would be no seizin in the husband. *Thompson v. Thompson,* 46 N. C., 431.

It is true that a widow may be endowed of an equitable estate, but the husband must be seized of an estate, whether legal or equitable.

"The seizin of the husband, in order to support the dower, must be seizin in law; not only actual constructive possession, but the legal right to possess." *Haire v. Haire,* 141 N. C., 88-90.

"The right to dower does not attach to the lands of the husband unless he was seized during coverture, and the husband must have an estate of inheritance. The word seizin is said to have a technical meaning when used in this connection, and at common law it imported a feudal investiture of title by actual possession, and with us it is the force of possession under some title or right to hold the possession; it is either a seizin in deed or a seizin in law, the former being in actual possession of a freehold estate and the latter the right to the immediate possession or enjoyment of a freehold estate. Seizin applies only to freehold estates or to the possession of land of a freehold tenure. Seizin in fact and in deed has also been defined to be possession with intent on the part of him who holds it to claim a freehold interest, and seizin in law as the right of immediate possession according to the nature of the estate." *Redding v. Vogt,* 140 N. C., 566.

It is also not unreasonable to conclude, from an inspection of the whole will, that it was the purpose of the testatrix that all of her estate should be sold and the proceeds divided.

If this was her intention to have the real estate sold and converted into personalty the interest of the children in the estate would be personal property. *Benbow v. Moore,* 114 N. C., 269.

The testatrix received, under her father's will, $10,000, which belonged to her children at her death, and she had advanced to the husband of the petitioner more than his share of the fund.

She had invested $6,300 of this fund in land, and owed a part of the purchase money, and she knew that she must account to the five children who had received nothing.

Under these facts appearing on the face of the will, and knowing that the children could follow the trust fund in the land, she devises the land to her executors in trust to sell, and, after the payment of certain claims, to divide the proceeds among her children.

If this construction is permissible, the case of *Patton v. Patton,* 60 N. C., 574, is an authority against the petitioner.

The language used in providing for the support of her husband seems to support this view. If she did not intend for the land to be sold and the proceeds divided, why did she not give him a life estate in the land?

If either of these contentions can be maintained, there was no seizin in the husband, and the petitioner would not be entitled to dower; but we refrain from passing on them finally in the condition of the pleadings.

Affirmed.

CHLOE SANDERS v. R. M. SANDERS.

(Filed 15 November, 1911.)

1. **Divorce a Mensa—"Six Months" Period—Evidence.**
On appeal from an order allowing alimony *pendente lite* in an action for divorce *a mensa* brought by the wife, the objection that the judge in the lower court considered evidence of the conduct of the husband to the wife within six months of the institution of the suit will not be held for error when it also appears that there was evidence sufficient of acts done before the six months statutory period of time to sustain the order.

2. **Same—Alimony Pendente Lite—Removing Property—Fraud.**
An order allowing the wife alimony *pendente lite* in her action for divorce *a mensa,* on facts within the six months, will not be disturbed on appeal when it appears from findings of fact by the judge of the lower court, upon sufficient affidavits, and which will entitle the plaintiff to divorce if established, that the

defendant is attempting to remove from the State, and to dispose of his property and remove it from the State, whereby the plaintiff may be disappointed of her alimony. Revisal, secs. 1562, 1563, 1566.

3. **Same — Averments — "Information and Belief" — Jurisdictional Affidavits.**

The matters in the jurisdictional affidavit in an action for divorce *a mensa* brought by the wife may be stated in general terms following the language of the statute, Revisal, sec. 1563, and also when certain allegations that the defendant is about to remove himself and his property from the State to defeat the right of alimony of the wife are necessary; but no order should be made to deprive defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits.

4. **Same—"Condition Intolerable"—Interpretation of Statutes.**

When in an action by the wife for divorce *a mensa* there is evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's conduct was a long course of neglect, of cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the purview of Revisal, sec. 1652, subsec. 4, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome."

5. **Same—Wife's Condition.**

The acts of the husband which will render the wife's "condition intolerable and her life burdensome," Revisal, sec. 1652, subsec. 4, so as to entitle her to a divorce *a mensa*, are largely dependent on the facts in each particular case, such as the station in life, temperament, state of health, habits and feelings of the plaintiff.

6. **Same—Averment—Positive Terms.**

In an action by the wife for divorce *a mensa*, when the allegations are necessary that the defendant is about to remove himself and property from the State to jeopardize the plaintiff's right to alimony, it is not presumed that the wife would have personal knowledge of her husband's plans or purpose in this regard, and an averment thereof in positive terms and of her personal knowledge is not required.

APPEAL from *Justice, J.*, at April Term, 1911, of UNION.

Civil action to obtain a divorce from bed and board, instituted by the wife against the husband, heard on motion for alimony *pendente lite.* The court having duly considered the case on the complaint properly verified, with affidavits supplementary thereto, and a verified answer used as an affidavit by defendant, made full and extended findings of fact sufficient to sustain an order for alimony and to justify a divorce *a mensa* if established at the hearing, and thereupon made an order allowing alimony *pendente lite,* and defendant excepted and appealed.

Stack & Parker for plaintiff.
Redwine & Sikes for defendant.

HOKE, J., after stating the case: It was chiefly objected to the validity of his Honor's order, "that it was based mainly upon illegal evidence, in that the court considered alleged facts within six months of the institution of the suit." In our view, there are facts found by his Honor anterior to the six months and on relevant testimony amply sufficient to justify the order allowing plaintiff alimony; but, apart from this, the ordinary jurisdictional affidavit of plaintiff annexed to the complaint contains the additional averment, "that plaintiff is informed and believes that defendant is attempting and about to remove from the State, and is about to dispose of his property and move the same from the State, whereby plaintiff may be disappointed of her alimony," and under our statute, Revisal, secs. 1562, 1563, 1566, and authoritative interpretations of it as in *Scoggins v. Scoggins,* 85 N. C., 348; *s. c.,* 80 N. C., 319; *Gaylord v. Gaylord,* 57 N. C., 74, where this is made to appear and the judge finds facts to be true and sufficient to entitle plaintiff to divorce if established at the trial, the action may be instituted and an order for alimony properly made before the six months have elapsed. In *Scoggins' case,* 85 N. C., *supra,* the judge quotes with approval from *Gaylord's case* as follows: "The act certainly requires that in ordinary cases the facts upon which the petitioner founds her claim to relief shall have existed to her knowledge at least six months prior to the filing of the petition, and the seventh section of the act expressly enacts that she shall so state and swear. But the eighth section makes an exception to this, whenever 'the husband is then removing or about to remove his effects from the State.' In such a case the wife may exhibit her petition at any time, and if she shall state and swear 'that she doth verily believe that she is entitled to alimony, and that by delaying her suit she will be disappointed of the same, by the removal of her husband's property and effects from the State,' any judge may thereupon make an order of sequestration or otherwise as the purposes of justice may seem to require." And in the conclusion of the opinion the judge adds: "There is nothing in this or any other section of the act which indicates a necessity that she should file another bill or a supplemental bill, after the expiration of six months from the time when the facts which entitled her to relief occurred."

Defendant contends, also, that this additional allegation referred to is insufficient because made upon information and belief, and, further, because the same is too general in its terms, and should set out the facts upon which plaintiff's belief could properly be made to rest. Neither of these objections may be sustained. It is a general rule of pleadings, and one particularly insistent in divorce causes, that when a litigant is required to make averment or answer under oath as to facts necessarily or naturally within their personal knowledge, they should do so in positive terms. *Avery v. Stewart,* 136 N. C., 432-433. But the principle does not apply to an allegation of this character. Under the facts shown forth in evidence, this plaintiff would not likely have opportunity to know of her husband's plans and purposes as to a removal of his property, and her allegations concerning it are almost necessarily made on information and belief, and should therefore be held in proper form. See citation from *Gaylord v. Gaylord, supra.* And in reference to a fuller statement of the facts, when an allegation of this character becomes essential, before an order is passed depriving defendant of his property the facts upon which plaintiff's belief is formed should always be in evidence, so that the court may intelligently pass upon the questions involved; but it is sufficient when, as in this case, such facts are made to appear in the supplementary or additional affidavits of plaintiff. As a part of the jurisdictional affidavit, it is better if made in general terms, following as it does the language of the statute, Revisal, sec. 1563.

Defendant objected further, "That many of the allegations of fact alleged in the complaint as to the conduct of the defendant toward the plaintiff were unexplained, and in particular as to what prompted or caused them, and did not set forth the conduct of the plaintiff at that particular time, as required by law." There are decisions in this State to the effect that when divorce is sought from bed and board on the ground of cruel and barbarous treatment, alleging specific acts of cruelty and violence, etc., that the entire occurrence should be set forth, showing particularly circumstances of provocation, if any existed. *Martin v. Martin,* 130 N. C., 28. *O'Connor v. O'Connor,* 109 N. C., 142; *Jackson v. Jackson*, 105 N. C., 438. But the facts as found by the court do not bring this case within the principle.

As the cause will not unlikely come before the jury, we do not deem it necessary or desirable to make a detailed or extended reference to the testimony. The relevant and essential facts are for them, entirely unaffected by these preliminary findings. But the facts in evidence as disclosed by this action of the court will establish that the plaintiff in her married life has been free from blame, and that by a long course of neglect, cruelty, and humiliating insult, repeated and persisted in on the part of defendant, plaintiff's cause has been brought well within the provisions of our statute on which she chiefly relies, section 1652, subsec. 4: "If he shall offer such indignities to her person as to render her condition intolerable and life burdensome."

Speaking to this question in *Taylor v. Taylor*, 76 N. C., 436, a case not unlike the present in its general aspects, the Court said: "The decisions of the Court in *Coble v. Coble* and *Erwin v. Erwin* have not been controverted, and must be taken to have settled the meaning of the words 'indignities to the person,' as used in the statute. Insulting and disgraceful language by itself, addressed to the wife by the husband, may not be an 'indignity to the person' in a legal sense; and so, slight personal violence without injury to the body or health, of itself, will not justify a divorce. But both combined, and frequently repeated, would indicate such a degree of depravity and loss of self-command as much more readily to induce a court to believe there was danger of bodily harm, and such a just apprehension of personal injury as to render cohabitation unsafe. No undeviating rule has been as yet agreed upon by the courts, or probably can be, which will apply to all cases in determining what indignities are grounds of divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits and feelings of different persons are so unlike that treatment which would send the broken heart of one to the grave would make no sensible impression upon another." And further: "We may assume, then, that the Legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute."

Applying the principle, there is no error in the order allowing plaintiff her alimony, and the judgment below is

Affirmed.

M. C. EARNHARDT ET AL. v. BOARD OF COMMISSIONERS OF LEXINGTON.

(Filed 22 November, 1911.)

1. **Cities and Towns—Highways—Streets—Abutting Owner—Negligence—Damages.**

   As a rule, the abutting owner may not recover damages in his action against a municipality for diminution in the value of his property caused by a duly authorized change of grade in an established street, except when the work has been done in an unskillful or negligent manner, so as to proximately cause the damages claimed.

2. **Cities and Towns—Streets—Evidence—Nonsuit—Statute of Limitations—Harmless Error.**

   In this case damages are recoverable by plaintiff for diminution in the value of his property abutting on the street caused by the city's negligent construction in making authorized changes, and the error committed in the lower court in sustaining a nonsuit upon the evidence is adjudged harmless by reason of the statute of limitations having run against plaintiff's cause of action.

3. **Cities and Towns—Streets—Negligence—Abutting Owner—Permanent Damages.**

The damages awarded in an action against a city to an abutting owner by reason of a faulty construction or work in changing the grade of a street by the proper officers of a city are permanent, and cover those which are past, present, and prospective.

4. **Same—Statute of Limitations—Pleadings—Evidence.**

The statute of limitation of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred.

APPEAL from *Lyon, J.*, at February Term, 1911, of DAVIDSON.

Civil action for damages for alleged wrongful diversion of water upon plaintiff's premises, causing substantial damages thereto.

Plaintiff alleged that defendant had changed the grade of a public street in front of his home, and, in doing this and in the construction of the sidewalk, had so done the work that whenever there was a hard or beating rain a lot of water was collected and thrown in bulk upon his premises and the residence thereon, causing serious damage to his property and the family resident thereon. Defendant denied the wrong and pleaded the three-year statute of limitations thereto, in case same should be established. At the close of plaintiff's evidence, and again at close of entire testimony, there was motion of nonsuit. Last motion sustained. Judgment of nonsuit entered, and defendant excepted and appealed.

McCrary & McCrary for plaintiff.
E. E. Raper for defendant.

HOKE, J., after stating the case: It is well recognized with us that an abutting owner may not, as a rule, recover damages for diminution in the value of his property, caused by a duly authorized change of grade in a street which has been already established. *Dorsey v. Henderson,* 148 N. C., 423; *Wolfe v. Pearson,* 114 N. C., 621. The position is allowed to prevail on supposition that the municipal authorities shall not proceed or have the work done in an "unskillful or negligent manner," and where it is shown that there has been a breach of duty in this respect, an action lies. This principle, announced in *Meares v. Wilmington,* 31 N. C., 73, has been upheld in numerous cases in our Court. *Jones v. Henderson,* 147 N. C., 120; *Wright v. Wilmington,* 92 N. C., 156, etc., and was approved and applied in the recent case of *Harper v. Lenoir,* 152 N. C., 723.

On a perusal of the record, we are inclined to the opinion that there was evidence to show, in this instance, a negligent construction of the sidewalk, causing unnecessary damage to plaintiff's premises; but this view cannot avail plaintiff, for the reason that, on the face of the complaint and the uncontroverted facts, it appears that plaintiff's cause of action is barred by the three-year statute of limitations, and the statute having been duly pleaded, the order of nonsuit should, in any event, be considered and treated as harmless error. *Oldham v. Rieger,* 145 N. C., 254; *Cherry v. Canal Co.,* 140 N. C., 422. In *Harper's case* it was held that the measure of damages, in actions of this character, was ordinarily the impaired and market value of the property, and that, on action brought, recovery should be had for the entire wrong—past, present, and prospective. Speaking to this question and the principle upon which it was properly made to rest, the Court said: "And having been caused by a change of grade, done, as a rule, under statutory authority and considered of a permanent nature, under our decisions there may, and, ordinarily, must be but one recovery for the entire wrong." This general principle is well stated by *Justice Avery* in *Ridley v. R. R.,* 118 N. C., 998, as follows: "But even where the injury complained of, either by the servient owner or an adjacent proprietor, is due to the negligent construction of such public works as railways, which it is the policy of the law to encourage, if the injury is permanent and affects the value of the estate, a recovery may be had at law of the entire damages in one action." Citing *Smith v. R. R.,* 23 W. Va., 453; *Troy v. R. R.,* 3 Foster (N. H.), 83; *R. R. v. Maher,* 91 Ill., 312; *Biger v. R. R.,* 70 Iowa, 146; *Fowle v. R. R.,* 112 Mass., 334, 338; *s. c.,* 107 Mass., 352; *R. R. v. Estorle,* 13 Bush (Ky.), 667; *R. R. v. Combs,* 10 Bush (Ky.), 382, 383; *Stodghill v. R. R.,* 53 Iowa, 341; *Cadle v. R. R.,* 44 Iowa, 1. And is said by Mr. Elliott, in his work on Roads and Streets, to obtain very generally in determining the damages recoverable on a change of grade by the authorities. On the subject the author says:

"SEC. 488. *All Damages Are Recoverable in One Action.* The change of grade is a permanent matter, and all resulting injury must be recovered for in one action, for the property-owner cannot maintain successive actions as each fresh annoyance or injury occurs. The reason for this rule is not far to seek. What is done under color of legislative authority, and is of a permanent nature, works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages, but may also recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions and produce injustice and confusion. It is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain."

It will be noted that this principle of awarding permanent damages for a certain class of injuries, made obligatory as to railroads, Revisal, sec. 394, is placed upon the ground that the work complained of is of a permanent nature, done by virtue of statutory authority and for the public benefit, and is thus differentiated from nuisances maintained by private persons, individual or corporate, and causing recurrent damages, as in *Roberts v. Baldwin,* 151 N. C., 407, and *Spilman v. Navigation Co.,* 74 N. C., 675; and, further, that an action of this kind is not held to have necessarily accrued only when there has been actual physical interference or invasion of a claimant's property—the correct position when section 394, subsec. 2, or 395, subsec. 3, applies (*Stack v. R. R.,* 139 N. C., 366); but, as shown in *Harper's case,* the cause of action is for negligence, subject to the limitation established in section 395, subsec. 5, and is properly held to accrue at the time the work is negligently done and the value of claimant's property thereby sensibly impaired.

This action was commenced on 1 September, 1909. On the allegations of the complaint and the uncontroverted facts, the work was done and substantial injury caused by the negligent construction, commenced in 1904. The plaintiff's cause of action is therefore clearly barred by lapse of time, and the statute having been properly pleaded and insisted on, the results of the trial should not be disturbed. There is no reversible error, and the judgment of nonsuit must be

Affirmed.

GEORGE M. HARDEN v. CHESAPEAKE AND OHIO RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 22 November, 1911.)

1. **Carriers of Goods—Live-stock Bill of Lading—Negligence—Insurer—Exceptions.**

A railroad company's liability for negligent injury to stock shipped under its usual live-stock bill of lading is that of a common carrier, with the exception that it is not held as an insurer against injuries arising from the natural or proper vices or the inherent nature and propensities of the animals themselves, unless the injuries from such sources are attributable, in whole or in part, to the carrier's negligence.

2. **Same—Duty of Carriers—Cars.**

Carriers in the proper performance of their duties are required to provide suitable and adequate cars for the care and preservation of live stock during their carriage, or to afford proper facilities for having them watered and attended to, and to make proper provision for them in reference to peculiar traits or conditions of which they have notice, especially when the carrier makes stipulations in reference to such conditions.

3. **Same—Evidence.**

A common carrier received a shipment of valuable horses, issuing therefor its usual live-stock bill of lading, confining recovery, in event of injury, to the inadequate maximum sum of

$100 each, at the same time being informed of the character of the horses, and that there was a stallion among them which would injure the other animals if allowed to mingle with them; and in consequence undertook to box off the stallion to itself in the car with the others. There was evidence tending to show that the boxing-off of the stallion was a "sorry job," and being required by a connecting line of carriers to make it more secure, did so, but by mistake placed another horse therein, and put the stallion in with the other horses in the car, resulting in their injury: *Held*, evidence sufficient of the actionable negligence of the initial carrier, and the stipulation in the bill of lading restricting the amount of the recovery is therefore void.

4. Same—Arbitrary Value—Inadequacy—Public Policy.

In order to sustain a provision in a railroad company's live-stock bill of lading limiting the amount of recovery to a certain sum per head, it must appear that there was an intent and *bona fide* effort on the part of the carrier and consignor to fix upon the value of the shipment, and it will not meet the requirement when the carrier has notice that the shipment contemplated was of high-priced horses, that the stipulated amount of recovery was grossly inadequate, and that the agent wrote in the stipulated valuation in an old form of bill of lading after asking the consignor if he should do so in order to give him a lower rate of freight.

5. Same—Contract Against Negligence—Waiver.

A stipulation in a carrier's live-stock bill of lading which arbitrarily fixes a maximum valuation of the stock shipped and recoverable thereunder, without examination of the stock or any *bona fide* effort to arrive at their true value, is, to the extent that it is inadequate, a contract against the consequence of the negligent acts of the carrier, and invalid; and the acts of the consignor in making the shipment under a bill of lading of this character will not be construed as a waiver of the effect of the negligent acts of the carrier inflicting injury to the stock.

6. Carriers of Goods—Public Policy—Contract Against Negligence —Interstate Commerce Commission.

A ruling of the Interstate Commerce Commission designed and intended simply as a regulation establishing a reasonable and proper freight rate for the shipment of live stock, without more, cannot affect the principle prevailing in this State, that the provision in a live-stock bill of lading which arbitrarily fixes the maximum amount recoverable is void as a contract on the carrier's part against its own negligence.

7. **Carriers of Goods—Live-stock Bills of Lading—Void Stipulations —Lex Loci Contractus—Presumptions.**

   The decisions in this State declaring void, under certain conditions, a stipulation in the live-stock bill of lading of a railroad as a contract against recovery for its negligent acts, are based upon the principles and policy of the common law, and where the contract of carriage is made in another State, these same principles are presumed as to the law of such other State, in the absence of evidence to the contrary.

APPEAL from *Whedbee, J.*, at the April Term, 1911, of WAKE.

Civil action to recover for damages to live stock, shipped by plaintiffs over the lines of defendant companies.

On the trial, it appeared that plaintiffs, having purchased a number of standard-bred horses, in February, 1910, shipped same over lines of defendant companies from Lexington, Ky., over C. and O. road, to Lynchburg, Va., and from that point over the Southern to Greensboro, N. C. There was evidence, on the part of plaintiff, tending to show that plaintiffs, during the negotiations for shipment, informed the agent of the C. and O. road that the horses were a high-priced lot and that one was a stallion, about three years old; that the natural propensities of a stallion, of that age, and of this one, were such that it was dangerous to turn him in with the other stock, and that defendant, the C. and O. road, on being informed that such an animal was in the lot, undertook and agreed to have him securely boxed off from the others; that this was done in such a negligent manner that, when the car reached Lynchburg, this partition or stall was entirely down, allowing all the stock to mingle together. The agent of the C. and O., describing the manner in which it had been first constructed, spoke of it as a "sorry job," and, owing to this fact and the condition of the car, the Southern Railway refused to receive the stock, at Lynchburg, until the car was repaired and the conditions corrected; that this was done by the agent of the C. and O. and the stall securely built, but, in replacing the horses in the car, said agent put in the box stall one of them which had already been hurt and turned the stallion in with the others, and with the result that, when the stock arrived at Greensboro, they were bitten and kicked until one of them died of his injuries and others badly damaged, to the amount of $1,160; that of this damage $450 was done to the horses of another shipper, and the damage done to plaintiff's horses, attributable to defendant's negligence, amounted to $710.

There was allegation, with evidence, on part of defendant, tending to show that defendant, the C. and O. Railroad, had only made a rate as far as Lynchburg, the shipment from that point being over the lines of the Southern Railway; that the defendant, the C. and O. Railroad, had not undertaken to box off the stallion and was guilty of no negligence in that respect. Defendant further introduced and relied upon the written contract of shipment or bill of lading, in which it was stipulated, in effect, and as relevant to the inquiry, that, in consideration of a reduced freight rate, the C. and O. Railroad was only to be chargeable for injuries arising from its *gross* negligence, and, on the question of value, that in cases of any injuries to the stock, for which said company was responsible under the contract, the amount of recovery should, in no case, exceed $75 for each horse, mule, stallion, or jack; $30 for each cow, steer, or bull, and $5 for each other animal; and the agent testified that this was an old printed form, and the value, $75, having been changed to $100 by subsequent regulations of the company, he inserted the $100 in lieu of the $75, and that, by this classification and rating, the plaintiffs saved several hundred dollars in freight charges. There was testimony, also, for defendant, that the classification and freight rate, in this instance, was in accord with a regulation made and approved by the Interstate Commerce Commission.

The judge charged the jury and, on issues submitted, they rendered the following verdict:

1. Was the plaintiff's property injured by the negligence of the defendant, the Southern Railway Company, as alleged in the complaint? Answer: No.

2. Was the plaintiff's property injured by the negligence of the defendant, the Chesapeake and Ohio Railway Company, as alleged in the complaint? Answer: Yes.

3. What damages is plaintiff entitled to recover from the Southern Railway Company? Answer: None.

4. What damages is plaintiff entitled to recover from the Chesapeake and Ohio Railway Company? Answer: $710.

Judgment on verdict for plaintiff, and defendant C. and O. Railroad excepted and appealed.

Armistead Jones & Son for plaintiff.
Aycock & Winston for defendant.

HOKE, J., after stating the case: It is very generally held that railroad companies, receiving live stock for shipment, take and hold them as common carriers, and, as a rule, are chargeable with the duties of such carriers concerning them. There is a recognized limitation on the obligations of common carriers, in reference to live stock, to the effect that they are not considered as insurers of such property against injuries arising from the natural or proper vices or the inherent nature and propensities of the animals themselves, or from the "vitality of the freight," as it is sometimes expressed, unless the injuries from such source are attributable, in whole or in part, to the carrier's negligence. The general principle, with its recognized modifications, is very well stated in Moore on Carriers, p. 486, as follows: "Carriers of live stock are common carriers, subject to all the duties, responsibilities, and liabilities, and entitled to all the rights and privileges, of a common carrier of merchandise or other inanimate property, save in one important respect. While common carriers are insurers of inanimate property against all loss and damage except such as is inevitable or attributable to the act of God, or caused by public enemies, and except that they are not held liable for losses which result from the inherent and intrinsic qualities of the goods carried by them, as carriers of live stock, they are not insurers of animals against injuries arising from or attributable to the natural or proper vices, or the inherent nature, propensities, and habits of the animals themselves, and which could not be prevented by foresight, vigilance, and care." And in Hale on Bailments and Carriers it is said: "Carriers of live stock are common carriers wherever carriers of other goods would be, but they are not liable, in the absence of negligence, for such injuries as occur in consequence of the vitality of the freight"; and these statements will be found to accord with the great weight of authority. *Selby v. R. R.,* 113 N. C., 592; *Covington Stock Goods v. Keith,* 139 U. S., p. 128; *McCune v. R. R.,* 52 Iowa, 600; *Clark v. R. R.,* 14 N. Y., 570; Elliott on Railroads, sec. 1548; Hutchinson on Carriers (3d Ed.), sec. 339. Accordingly, carriers in the proper performance of their duties are required to provide suitable and adequate cars for the care and preservation of live stock during their carriage and to afford proper facilities for having them watered and attended to and to make proper provision for them in reference to peculiar traits or conditions of which they have notice, and especially when the carrier makes stipulations in reference to such conditions. *Kinnick Bros. v. R. R.,* 69 Iowa, 665; *Haynes v. R. R.,* Mo. App., 582; *Sturgeon v. R. R.,* 65 Mo., 596; *Indianapolis and C. R. R. v. Allen,* 31 Ind., 394; *Smith v. New Haven R. R.,* 12 Allen, 531; *Shaw v. Southern R. R.,* L. R. I., vol. VIII, p. 10 (1881-82); Hutchinson on Carriers (3d Ed.), secs. 342, 343 and 636; Moore on Carriers, p. 498, sec. 3.

There was ample evidence on part of plaintiffs tending to establish a breach of duty on the part of the C. and O. Railroad Company and justifying the verdict that the stock was injured by the negligence of said company. The agent of that road, testifying for defendant, in reference to the original construction of the stall, said it was "a sorry job," and when he had caused it to be rebuilt at Lynchburg, he put the wrong horse into it and turned the stallion in with the other horses. This being true, it is well established with us that "a common carrier in its contract of shipment cannot stipulate against recovery for loss or damage occasioned by its own negligence, and it can make no such stipulation against total or partial loss. *Stringfield v. R. R.,* 152 N. C., 128; citing *McConnell v. R. R.,* 144 N. C., 90; *Everett v. R. R.,* 138 N. C., 71; *Capehart v. R. R.,* 81 N. C., 438; *Parker v. R. R.,* 133 N. C., 335; *Caldison v. Steamship Co.,* 170 U. S., 272; *Railway v. Solan,* 169 U. S., 135; *Railway v. Lockwood,* 84 U. S., 357; *Nuneton v. Railway,* 31 Minn., 85, and numerous other decisions.

There are cases which hold that the act of defendant, in turning the stallion in with the other stock, would be an act of gross negligence and so expressly within the terms of the agreement; but, without reference to this aspect of the evidence, under the doctrine as it prevails in this jurisdiction, this stipulation is entirely void as against public policy, or in any event can only operate to relieve them from liability as insurers, which is perhaps the correct interpretation of the words. And on the facts in evidence this same principle, which avoids stipulations against recovery for negligence on the part of the carrier, should obtain in reference to the clause in the bill of lading restricting the amount where the recovery is had on that ground. Speaking to this question in *Everett's case,* the Court said: "It would be an idle thing for the courts to declare the principle that contracts for total exemption from loss arising from a carrier's negligence a subversion of public policy and void, and at the same time uphold a partial limitation which could arise to prevent anything like adequate or substantial recovery by the shipper."

In the present case it appears that this was a high-priced lot of horses, and the agent of the initial carrier was informed of this fact; that the value was inserted by the agent in a printed formula according to a predetermined, inadequate valuation, and that there was no intent or effort to fix upon the true value of the shipment or to approximate it under any conditions sanctioned or permitted by the law; and it further appears by the uncontradicted testimony that the fair average value of the stock was between two or three hundred dollars per head. In *Stringfield's case, supra,* on facts very similar, the Court held that a restrictive stipulation of this kind as to recoveries for negligence on the part of carriers was in contravention of public policy and void. The ruling in *Stringfield's case* and others of like purport was not made to depend upon whether there was one or more horses in the shipment—a view presented on the argument here—but on the position that there had been no *bona fide* effort to arrive at the true value of the shipment or to approximate it, and to allow an arbitrary, predetermined valuation to stand far below the actual value would in actions of that character be in effect to uphold a stipulation against recovery for negligence—a stipulation, as stated, forbidden by our law. In *Stringfield's case* attention was called to the fact that the principle we are discussing, "when properly understood and applied, did not prevent the parties from agreeing upon the valuation of a given shipment which should form the basis of adjustment in case of loss or damage, and where this was done in the *bona fide* effort to fix upon the true value and was made the basis of a fair and reasonable shipping rate, the parties would be held to the agreed valuation, though the loss should occur by reason of the carrier's negligence." And it was said, too, that an agreed valuation might be in rare instances allowed to stand for the purpose indicated, where it appeared that the agent of the carrier being without knowledge or notice of the true value of the property and without opportunity to inform himself so as to make intelligent estimate concerning it, the parties, in the *bona fide* effort to put a correct valuation upon it, fix upon a fair average value of property of the kind constituting the proposed shipment and make the same, as stated, the basis of a fair and reasonable shipping rate—an instance afforded in the case of *Jones v. R. R.,* 148 N. C., 581. Such an agreement and a valuation so established may not be allowed to prevail simply because the minds of the parties have met and agreed upon the amount, but in actions for injuries caused by negligence of the carrier it must have been agreed upon in the *bona fide* effort to fix upon a true valuation of the stock, and as an aid to the correct solution it may at times be well to submit an issue as to the true value or the average valuation of the property of the kind constituting the shipment where such a view of the question is permissible. There is no allegation or evidence of any fraud or concealment as to value on the part of the shipper, a principle sometimes present in such cases, nor can the doctrine of estoppel be invoked for defendant's relief on the facts presented in the testimony. The plaintiffs, on this question, testified that they simply asked for the shipping rate, and it was given them, without more. The agent of defendant testified that all that was said on the subject was that he asked if the horses were to be shipped at the usual valuation, and on being answered yes, he wrote that valuation in the bill of lading. And further, as follows:

Q. Did he say anything about the value of the horses? A. No, I do not recall that he did. I asked him the question if they were to be shipped at that valuation, and he said yes.

Q. He did not say anything about the value himself? A. No.

Q. He did not suggest it to you? A. No.

Q. He did not read the contract; it was all done in about two minutes? A. Yes; it would take a long time to read it.

Q. You did not read it to him? A. No.

Q. He said nothing as to the value of the horses? A. He only answered my question when I asked if they were to be shipped on the $100 valuation. He answered my question.

Speaking to this subject in *Stringfield's case,* the Court said: "Nor do we think that the doctrine of estoppel as applied in many of the cases relied upon should avail defendant here. Some of these decisions could be reconciled on the ground that if the disproportion between the actual and the stipulated values is so great as to give clear indication that there was no effort made to fix upon or approximate the true value, as in this case, it could be properly held that such a contract would be neither fair nor reasonable; but in many of them we think the doctrine of estoppel is too broadly stated. For if a contract like the one we are considering is such as to deny substantial recovery for loss occasioned by the carrier's negligence, it is void as against public policy, and it is not permissible to uphold such an agreement on the principle of estoppel. Such a position carried to its logical conclusion would enable individuals as to their personal contracts and conduct towards each other to set at naught both the public statutes and police regulations of the State. Accordingly, we find that except in cases of positive fraud, which in whole or in part may operate to set aside the contract relation, the doctrine of estoppel as ordinarily applied is only available in aid or extension of valid contracts. Bigelow on Estoppel (5th Ed.), citing *Brightman v. Hicks,* 108 Mass., 246; *Langorn v. Sankey,* 55 Iowa, 52; *Shurmen v. Eastin,* 47 Ark., 351; *Klink v. Kudbel,* 37 Ark., 304, authorities which fully support the text."

It was further insisted that the recovery should not be sustained because the classification and rate made in the bill of lading had the sanction and approval of the Interstate Commerce Commission. We have not the ruling of the Commission before us, but in our opinion it cannot for a moment be sustained that a ruling of the commission designed and intended simply as a regulation establishing a reasonable and proper freight rate, without more, should have the effect of altering a principle of public policy long prevailing in the State, as said in *Everett's case, supra,* a principle established and adhered to for grave and weighty reasons and considered necessary for the protection of the great body of shippers. Replying to a suggestion somewhat similar, the Court in *Kissenger v. Fitzgerald,* 152 N. C., 252, said: "It is the settled policy of this State that common carriers may not contract against loss or damage occasioned by their negligence; and it has been held by the Supreme Court of the United States that, unless and until there is some valid regulation by Congress of the Interstate Commerce Commission directly affecting the matter, a State has the right to establish such a policy and enforce it in reference to interstate shipments. *Pa. Ry. v. Hughes,* 191 U. S., 477."

We are not inadvertent to the fact that the contract of shipment was made in Kentucky, and there is no evidence before us as to the rules prevailing in that State concerning it. The doctrine referred to, and which we hold to be controlling on the facts presented, was established and has come down to us from the principles and policy of the common law in reference to public carriers, and the same is presumed to obtain in a sister State in the absence of evidence to the contrary. *Roberts v. Pratt,* 152 N. C., 731. On investigation, however, it seems that like doctrine prevails in full force in the State of Kentucky and has been made a part of the organic law of that State. *Lewis v. Louisville and Nashville R. R.,* 135 Ky., 362.

On the whole matter, we find no reversible error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

CLARK, C. J., concurring in the opinion of the Court: For reasons of the soundest public policy, it has always been settled law that a common carrier cannot contract for either total or partial exemption from loss occasioned by its own negligence. The shipper and the common carrier are not on equal terms. The shipper must send his freight by the common carrier or not at all. He is therefore entirely at the mercy of the carrier unless protected by the higher power of the law against being forced into contracts limiting the carrier's liability.

In this case the evidence of negligence of the carrier is abundant and has been found by the jury. Therefore the carrier could not by any alleged contract relieve itself from liability for any part of the damages caused by its own negligence. The fact that it offered to carry the stock on the common-law basis of liability for its own negligence if the shipper would pay $650 extra, but would take off the $650, provided it was relieved against liability for its own negligence for all above $100 per animal, should not be seriously considered in the light of the decisions and of the "reason of the thing." In the language of the great dramatist (Henry VIII., Act 5, Sc. 3), the device is "too thin and bare to hide the offense."

The shipper was entitled to have his stock carried at the rate at which they were actually carried, which is evidently the current rate fixed by competition, and with the common-law liability on the carrier to pay the full extent of any damages caused by its own negligence. The carrier had no right to require $650 additional freight by way of insurance to shipper against its own negligence, since that is a liability which is assumed by the very nature of the contract of carriage.

A provision limiting liability to an agreed amount is invalid if the injury was caused by the carrier's negligence. *Everett v. R. R.*, 138 N. C., 71; *Capehart v. R. R.*, 81 N. C., 438; *Gardner v. R. R.*, 127 N. C., 293; *McConnell v. R. R.*, 144 N. C., 90. This has also been held in England, Alabama, California, Colorado, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Jersey, Pennsylvania, Tennessee, and Texas. See cases collected 12 Ann. Cas., 1131-1134.

It is true that in *Hart v. R. R.*, 112 U. S., 331, that Court was led away by some means to disregard this principle which has been so long and so uniformly held and the maintenance of which in its integrity is so necessary to the business interests of this country, which are largely dependent upon fair treatment by the great common carriers. To cure this departure of the Court, Congress passed what is known as the Hepburn Amendment to section 20 of the Interstate Commerce Act (U. S. Comp. Stat., Supp. 1907, p. 906), which provides that the initial carrier is liable for any loss, damage, or injury to the goods *caused* by it or any connecting carrier, and makes void any contract, receipt, rule, or regulation which attempts to exempt the carrier from this liability. 12 Ann. Cases, 1133, and cases cited.

In *R. R. v. Cranshaw*, 5 Ga. App., 675, it is held that the State courts have jurisdiction of an action arising under the Hepburn Act, and that any limitation of value or preadjustment of damages by a stipulation restricting the recovery of damages to an amount less than the actual loss caused by the carrier's negligence is void under this act. To same effect, *Latta v. R. R.* (U. S. C. C. A.), 172 Fed., 850. Under these decisions the doctrine laid down in *Hart v. R. R.,* 112 U. S., 331, is reversed by the Hepburn Act, which restores in its integrity the common-law rule that a common carrier cannot contract to be relieved in whole or in part from liability for damages caused by its negligence. The Pennsylvania Court, in *Grogan v. Express Co.,* 114 Pa., 523, 60 Am. Rep., 360, even prior to the Hepburn Act, refused to follow the decision in *Hart v. R. R., supra,* and many other courts of repute did the same; and it may be said with some confidence that the best legal thought of the country sustained them. The effect of the *Hart case, supra,* if unreversed, would have been to place the business interests of the country in the power of the common carriers, for no shipper can contract on equal terms with them.

I agree with *Mr. Justice Allen* that *Jones v. R. R.,* 148 N. C., 580, and *Winslow v. R. R.,* 151 N. C., 250, should be overruled.

ALLEN, J., concurring: I think the authorities establish the following principles, which are based on a sound public policy and on reason:

(1) That a common carrier is an insurer, and, without proof of negligence, is liable for all injuries to goods being trans-

ported, unless the injury is caused by the act of God, the public enemy, the negligence of the shipper, or by the inherent qualities of the goods.

(2) That the natural propensities of live stock are included in the term "inherent qualities."

(3) That a private carrier for hire is not an insurer, but is a bailee, and is only liable for negligence.

(4) That the common carrier may limit its common-law liability as an insurer by contract which is reasonable and based on a valuable consideration, and when so limited it becomes a bailee for hire, and liable for negligence.

(5) That it cannot limit its liability for negligence.

The cases in our reports uniformly hold this doctrine, except *Winslow v. R. R.*, 151 N. C., 250, which follows *Jones v. R. R.*, 148 N. C., 580.

I do not think the *Jones case* was correctly decided, and believe it is wise to overrule it and the *Winslow case.* The learned judge who wrote the opinion in the *Jones case* cites, in support of the decision, four North Carolina cases: *Selby v. R. R.*, 113 N. C., 588; *Mitchell v. R. R.*, 124 N. C., 246; *Gardner v. R. R.*, 127 N. C., 293, and *Everett v. R. R.*, 138 N. C., 74, and quotes from the *Gardner case* as follows: "In the *Gardner case* the law is summarized as follows: 'A common carrier can make a valid agreement, fixing the value of shipments in case of loss by its negligence, if such agreement be reasonable or based upon a valuable consideration, and it must clearly appear that such was the intention of the parties.' "

I do not think these authorities sustain the decision.

In the *Selby case* the valuation clause in a bill of lading was not involved, and the only question raised was the reasonableness of a stipulation requiring the owner to give notice of injury to his stock before removal from possession of the carrier.

In the *Mitchell case* the bill of lading exempted the carrier from risks "*not arising from negligence*," and the single question decided was whether, under such a bill of lading, the burden was on the plaintiff to prove negligence, or that a presumption of negligence arose from proof of injury while in possession of the carrier.

In the *Gardner* and *Everett cases* it was expressly held that the valuation clauses in those cases were not valid, and the owners were allowed to recover the amount of their losses.

The quotation from the *Gardner case* was taken from a head-note, and is not, I think, supported by the opinion.

It is said in that case: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its negligence."

In the *Everett case* this is quoted with approval, as is the following from Hutchison on Carriers: "A majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants, and it is also held by a majority of the courts that a contract limiting the liability of the carrier to a certain sum in case of loss, that is, contracts designed to secure a partial exemption from liability, while valid and conclusive where the loss is occasioned by something other than the carrier's negligence, cannot be allowed where the loss was occasioned by the negligence of himself or his servant, but that in such case the owner may recover the full value of the goods."

I do not think *Judge Ashe* has been excelled for accuracy and clearness by any judge who has been a member of this Court, and in *Capeheart v. R. R.*, 81 N. C., 443, speaking of the effect of stipulations in bills of lading limiting liability, he says: "Public policy demands that the right of the owner to absolute security against the negligence of the carrier and all persons engaged in performing his duty shall not be taken away by any reservation in his receipt, or by any arrangement between them and the performing company. . . . From an examination of the authorities on this subject, we conclude that a common carrier cannot, by special notice brought home to the knowledge of the owner of the goods, much less by general notice, nor by contract even, exonerate himself from the duty to exercise ordinary care and prudence in the transportation of goods; and we deduce from the principles enunciated by them the following propositions: (1) That a common carrier being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part. (2) That he cannot by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care."

In Cyc., vol. 6, 391, the author says: "The attempt on the part of carriers to limit their liability as against their own negligence or that of their servants, has been particularly persistent where the contract of transportation is with reference to live stock, but such limitations have been uniformly held ineffectual."

In this case the jury has found as a fact that the stock of the plaintiff was injured by the negligence of the defendant, under instructions to which there is no exception, and I, therefore, concur in the opinion that the plaintiff is entitled to recover the damages he sustained, notwithstanding the valuation clause in the bill of lading.

M. D. BAILEY, JR., v. CITY OF WINSTON.

(Filed 22 November, 1911.)

1. **Cities and Towns—Ditches for Improvements—Sewerage and Water—Authority to Construct.**

   An incorporated town or city has authority to dig ditches in its streets for the purpose of laying mains or pipes in the construction of a water or sewerage plant, or to let out work of this character to another under contract.

2. **Cities and Towns—Streets and Sidewalks—Excavations—Guards and Lights—Negligence—Contributory Negligence—Evidence—Questions for Jury.**

   In an action against a city or incorporated town for damages sustained by a pedestrian in falling, at night, into an open ditch made for the purpose of laying water or sewer pipes by the defendant's contractor, alleging negligence on defendant's part in not having it properly guarded, the question of defendant's negligence upon conflicting evidence is one for the jury.

3. **Cities and Towns—Excavations—Dangerous Conditions—Pedestrians—Lights and Guards—Ordinary Care—Negligence.**

It is the duty of a city or incorporated town to exercise ordinary care in guarding dangerous places in the streets, caused by ditches and excavations made in pursuance of its authority, with proper lights and barriers for the safety of pedestrians at night.

4. **Cities and Towns—Streets and Highways—Dangerous Conditions—Reasonable Care—Supervision.**

A municipality owes it as an absolute duty to put its streets and highways in passable condition and to keep them so by the exercise of reasonable and continuing care and supervision for the safe use of pedestrians thereon.

5. **Same—Defects—Notice, Express or Implied—Supervision.**

The ordinary liability of a municipality to a pedestrian injured by negligent defects in its streets or sidewalks depends upon whether the municipality had actual notice of the defect, or notice implied from the circumstances, as where the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision.

6. **Cities and Towns—Streets and Highways—Dangerous Conditions—Positive Duty—Contractor—Negligence.**

The duty of a municipality to keep its streets and sidewalks in repair and free from dangerous pitfalls is a positive one, which it cannot delegate to others to perform so as to relieve itself from liability for nonperformance, or for negligence in the manner of doing the requisite work in the proper way.

7. **Same—Wrongful Acts—Fixed Notice.**

The doctrine as to implied notice of a defect in a street or sidewalk, which causes an injury to a pedestrian, is not applicable when the very danger is created by the municipality itself or by some one under its direction, for then it is fixed with notice and liable for the damages proximately resulting from its negligence.

8. **Cities and Towns—Streets and Highways—Dangerous Conditions—Positive Duty—Contractor—Negligence—Liability of City.**

A city may not contract with another to make excavations in its streets or sidewalks, which it is authorized to do, and thereby escape liability for the negligent acts of its contractor, which cause an injury to a pedestrian.

9. **Evidence—Hypothetical Questions—Sufficiency of Testimony—Questions of Law—Questions for Jury.**

It is competent for a judge to decide whether there was any evidence of the facts assumed to exist in asking a hypothetical question of an expert, and then leave it to the jury to say whether the facts had been established by the proof, and instruct them, if they had not been, to disregard the answers.

10. **Witnesses—Impeaching Questions—Evidence.**

Evidence tending to show bias on the part of a witness is competent, as it enables the jury to properly weigh and consider his testimony.

APPEAL from *W. J. Adams, J.,* at March Term, 1911, of FORSYTH.

This action was brought by the plaintiff to recover damages for injuries sustained by his falling into an unprotected sewer-ditch, which was being constructed on Liberty Street, within the corporate limits of the city of Winston. The plaintiff alleged that the ditch was not properly guarded and protected on the night that he fell into it and was injured; whereas the defendant averred that it was sufficiently protected, and if plaintiff suffered injury, he brought it upon himself by his own carelessness and negligence, and also by reason of the fact that he was intoxicated.

The principal matters involved in the case were questions of fact, and the plaintiff offered evidence to sustain his contention—that is, that the ditch was not properly guarded and protected, and that he was not intoxicated. The defendant offered evidence to the effect that the plaintiff was a drinking man, that the ditch was protected by sufficient lights, ropes, and other barriers. Upon the issues thus raised the jury adopted the plaintiff's version of the facts and rendered a verdict for him, as appears in the record. The defendant appealed from the judgment entered upon the verdict.

L. M. Swink and J. E. Alexander for plaintiff.
Manly, Hendren & Womble for defendant.

WALKER, J., after stating the case: It appeared that the ditch was 2 feet wide and 9 feet deep, and was so near the path in common use, and in such an exposed position with reference to the street, that it became necessary to safeguard pedestrians and others using the sidewalk and street by placing lights or barriers, or both if the situation required them, at or near the excavation, so as to prevent an injury to them by falling into the ditch. The city had the clear right to dig the ditch for the purpose of laying mains or pipes, in the construction of a water or sewerage plant, and to employ the Bibb Company to do the work; but it did not, by reason of that fact, shift its duty and responsibility to those using its streets and who are injured by any defect in them, provided it had or should have had notice of the defect. The plaintiff had the right to use the street in going from the Zinzendorf Hotel, where he was boarding, to Gentry's Dog and Pony Show, under the circumstances shown in the evidence. The jury found, under proper instructions from the court, that he was not guilty of contributory negligence, so that the only remaining question is, Was the ditch properly guarded?

The defendant contended, and introduced evidence to prove, that it was, and that the injury was not caused by any negligence in that respect, either of the city or the independent contractor—assuming, for the sake of discussion, that the Bibb Company was such a contractor.

Evidence was introduced by the plaintiff to show that there was negligence in the fact that no proper safeguards had been placed at or near the ditch to warn approaching pedestrians, or others using the street, of the danger.

The defendant excepted to the charge of the learned judge (*W. J. Adams*) upon the ground that he had told the jury that it was the duty of the defendant to guard the dangerous place both with lights *and* barriers; but we do not so understand the very able and clear-cut charge of the judge; on the contrary, he instructed the jury that the defendant was required to exercise only ordinary care in the matter, and to guard the place by "lights or barriers" or in such other way as was reasonably sufficient for the protection and safety of the public. The charge was eminently fair and just to both parties, and after a careful consideration of it, we think it stated fully, and with remarkable clearness, the principles of law applicable to the facts, as the jury might find them to be, and is entirely without error.

The city of Winston was under the duty to keep its streets in proper condition and repair, and if in prosecuting any work of public improvement it became necessary to dig a ditch in one of them, the law requires that it should protect the public against injury therefrom, by sufficiently guarding the dangerous excavation in the exercise of such care, at least, as a prudent man would use under like circumstances. The duty and liability of a municipality in this respect is well stated in Moll on Independent Contractors and Employers' Liability, secs. 139-140, though we do not quote him literally: It is not easy to determine when a municipality is liable for the negligence of a contractor. It certainly cannot relieve itself from the duty which rests upon it by transferring that duty to the contractor. The corporation must see that the public is properly protected, and if the contractor fails to perform that duty, the city is liable for the resulting damage. The city will be responsible for the acts of an independent contractor if the matter involved in his contract is one of absolute duty owed by the city to an individual or the work is intrinsically dangerous, or when properly done creates a nuisance. It is the general rule that a city will be liable for the negligence of a contractor in its employ, where the work is performed under the direct control of the city's own officers. If otherwise liable, a city will continue liable although it has no control over the workmen of a contractor, and although it has, in its agreement with the contractor, stipulated that he shall be liable for accidents occasioned by his neglect. If the work be done by an independent contractor, the city will not be answerable where the injury is through some negligence of the contractor or his servant, not amounting to a failure of a duty which the city itself owes to the person injured; otherwise it would be liable for his neglect in like manner as where the work is executed by its officers. Whether the city will be jointly liable with a contractor, must depend on the circumstances of the case. If, for example, an excavation is left unguarded or unlighted by the contractor during the progress of the work, and the city has notice of its dangerous condition, express or implied, then the city will be liable to a traveler who, without fault on his part, is injured by driving or falling into it, because it would be liable if the excavation were made by a stranger. It may be said, generally, that it is as much the duty of a municipality to remove or guard against an obstruction to a public highway placed there by a third person as if it was so placed by the city itself; provided the city has actual or implied notice. The duty of the city to erect barriers and to establish signals in case of dangerous defects, etc., in the highway is not discharged by engaging a contractor to perform it. But where the negligence relates to a matter with reference to which the corporation is under no special obligation, the liability rests on the contractor alone. The generally accepted doctrine in this country is said to be "that a municipality which is charged with the duty of keeping certain highways in safe condition for public travel, and which has either authorized, or has been constrained by the operation of statute to permit, the performance of work which, in the absence of certain precautions, will necessarily render one of these highways abnormally dangerous for the time being, is liable for injuries caused by the absence of these precautions, whatever may be its relation to the party who is actually engaged in doing the work. The municipality lies in this regard under a primary, absolute, or nondelegable duty, in the performance of which it is bound to use reasonable care and diligence." Moll Ind. Contractors, p. 243, note 71, and cases cited in that and the other notes to sections 139 and 140, especially *Bennett v. Mount Vernon,* 124 Iowa, 537, where it is said: "If the matter involved was one of positive duty to the plaintiff, then, of course, the defendant town could not relieve itself by delegating the work to an independent contractor. Or if the work itself was intrinsically dangerous, or, when properly done, was likely to create a nuisance, the defendant town would be responsible for any damage resulting therefrom. *Wood v. Ind. Dist.,* 44 Iowa, 30." The same doctrine is stated in *Brusso v. City of Buffalo,* 90 N. Y., 697, as follows: "The defendant's counsel claims that before the city can be made liable, it must be shown that it had notice of the dangerous condition of the street. But that rule does not apply to a case like this. The city was under an absolute duty to keep its streets in a safe condition for public travel and was bound to exercise reasonable diligence and care to accomplish that end, and when it caused this excavation to be made in the street it was bound to see that it was carefully guarded, so as to be reasonably free from danger to travelers upon the street. It is not absolved from its duty and its responsibility because it employed a contractor to make the excavation. That is settled by a long line of decisions in this and other States. (*Storrs v. City of Utica,* 17 N. Y., 104; *Chicago City v. Robbins,* 2 Black (U. S.), 418; *Robbins v. Chicago City,* 4 Wall., 657-659; *Water Company v. Ware,* 16 *id.,* 566; *City of St. Paul v. Seitz,* 3 Minn., 297; *City of Logansport v. Dick,* 70 Ind., 65, 36 Am. Rep., 166; Dillon on Municipal Corporations, secs. 791, 792, 793.) There was a controversy upon the trial of the action as to whether the excavation at the place where the plaintiff was injured was properly guarded. The verdict of the jury is conclusive upon that point in favor of the plaintiff. It is claimed that there was a stone walk across the street, and that if the plaintiff had crossed upon that walk he would not have been injured. But a person desiring to cross the street, either in the nighttime or in the daytime, is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe; and if, in the nighttime, he desires to cross from one side to the other, and knows of no dangerous excavation in the streets, or other obstruction, he may cross at any point that suits his convenience, without being liable to the imputation of negligence. (*Raymond v. City of Lowell,* 6 Cush., 524, 530.) It was claimed that the proof showed that the place where this excavation was made was not in one of the streets of the city, but that it was in a turnpike belonging to the 'Buffalo and Aurora Plankroad Company.' I think the evidence satisfactorily shows that it was in one of the public streets of the city. It was within its limits, and whether one of its streets or not, it was a highway used by the public, and that is sufficient to render it liable for the consequences of an excavation made under its direction and left unguarded." A municipality is under a positive or absolute duty to put its streets and highways in passable condition, and to keep them so by the exercise of reasonable care and supervision. The decisions of this Court are to that effect. *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720; *Dillon v. Raleigh,* 124 N. C., 184; *Foy v. City of Winston,* 126 N. C., 381; *Cresler v. Asheville,* 134 N. C., 311. Numerous other cases might be cited from our own reports, but those already given will suffice to show what the doctrine is, with its limitations. Very instructive and useful cases on this point are *Fitzgerald v. Concord,* 140 N. C., 110; *Brown v. Durham,* 141 N. C., 252; *Brewster v. Elizabeth City,* 142 N. C., 11; *Kinsey v. Kinston,* 145 N. C., 108; *Revis v. Raleigh,* 150 N. C., 353. They all tend to this conclusion, that a city or town or village must keep its streets in good condition and repair so that they will be safe for the use of its inhabitants or of those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated and consequently guarded against, under ordinary circumstances, the municipality should have some notice of the defect, either actual or else implied from the circumstances; and in this connection it must be said that it is the duty of the city (and of course these principles apply generally to all forms of municipalities) to exercise a reasonable and continuing supervision over its streets, in order that it may know they are kept in a safe and sound condition for use. Sometimes notice of their defective condition is actual or express, again it is constructive or implied, where, for instance, the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision; and still again, it may be inferred by the jury from the facts in evidence. This principle is illustrated and was applied in *Fitzgerald v. Concord, supra,* where it is said, approving 1 Sh. and Red. on Negligence, sec. 369: "'Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and for practical purposes the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time so long that they ought to have been seen, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have been discovered by the exercise of reasonable diligence.' And again, in the same section: 'It is only reasonable that notice of latent defects should not be so readily presumed from their continuance as open and obvious defects. If these were so dangerous as to challenge immediate attention, the jury is justified in finding a very short continuance of such condition to constitute sufficient notice. Active vigilance is required to detect defects from natural decay in wooden structures, like bridges, plank sidewalks, and the like, which will necessarily become unsafe from age; but the most that ought to be required is the use of ordinary diligence by making tests and examinations with reasonable frequency, to ascertain whether they are safe or not. It has been held that notice will not be implied unless the defect was so open and noticeable as to attract the attention of passers-by. But travelers are not charged with any duty to search for defects in a highway as road officers are, and the better rule, in our judgment, is that knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers, or even of an officer frequently passing by. It is not a question whether all passers-by actually notice a defect, but whether it was noticeable.' And the decided cases support the doctrine as stated. *Jones v. Greensboro,* 124 N. C., 310, 313; *Kibele v. Philadelphia,* 105 Pa., 41; *Kunz v. Troy,* 104 N. Y., 346; *Pomfrey v. Saratoga, ibid.*, 459. On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing," and other considerations not necessary to be stated.

The general duty of a municipality with reference to the condition of its streets is discussed in *Gregg v. Wilmington,* 155 N. C., 18; *Jeffress v. Greenville,* 154 N. C., 490. The law applicable as between individuals is not the same when we come to consider the obligation of municipal authorities to the public, for in the latter case the duty to keep streets and highways in repair and free from dangerous pitfalls is a positive one, which they cannot, as public trustees, delegate to another to perform and thereby relieve themselves from liability for nonperformance, or for negligence in the manner of doing the requisite work in the proper way. The doctrine of express notice is not relevant to the question, when the very danger is created by the city itself or by some one under its direction, for there notice is necessarily implied. The principle is well stated by Moll, sec. 141, as follows: "If the act or omission of the independent contractor is a violation of some primary or inalienable duty of the city, such as that of keeping its streets in a reasonably safe condition for public travel, the city will be liable therefor. The duty of a city to exercise reasonable care to the end that its highways, streets, sidewalks, etc., shall be reasonably safe for ordinary travel, is absolute in the sense that it is primary and cannot be delegated so as to absolve it. The duty rests on a municipal corporation to keep its streets in a safe and passable condition, and where a contractor with the city failed to place proper guards about an excavation, thereby causing injury to a passer-by, the city was held liable. And the city is nevertheless liable for the unsafe condition of its streets even where it exercises no control over the contractor in respect of the manner of doing the work, except to see that it is done according to certain specifications. It is on sound principle that a city is responsible for injuries proceeding from dangerous and unguarded excavations left in its highways by an independent contractor, and the very fact of the contract charges the city with notice that the street is being dug up and puts it on inquiry as to whether any excavation made by the contractor is properly guarded and lighted. Nor can a municipality claim exemption from liability from defects in a street by reason of its not accepting the work of the contractor, where the defect has existed long enough to charge its officials with knowledge. A city is chargeable with notice of the existence of a dangerous obstruction in one of its streets, where such defect is the result of the negligence of contractors under the city, so as to dispense with the necessity of giving it express notice of its existence." Applying these well-settled principles to the facts before us, as evidently found by the jury, we have little difficulty in adjudging the liability of the defendant for the injury received by the plaintiff when he fell in the ditch.

There are some matters of evidence which require notice. The hypothetical questions put to the medical experts cannot be criticised for lack of evidence to support them. It was the duty of the judge, in the first instance, to decide whether there was any evidence of the facts assumed to exist, which he did, and then he left it to the jury to say whether the facts had been established by the proof, instructing them that, if they had not been, they should disregard the answers. We do not think the defendant can complain of the charge in this respect.

The questions tending to show the bias of one of the witnesses was competent, for it enabled the jury the better to determine the value of his testimony. It may have been slight, but there was enough evidence of a leaning towards the defendant to let it in, so that it might pass for what it was worth.

The case, it appears, was well tried and is, as we look at the record, free from any error.

No error.

R. W. OSBORNE v. S. J. DURHAM AND J. H. WILKINS.

(Filed 22 November, 1911.)

1. **Principal and Agent—Fraud—Misappropriation of Funds—Cash Transactions—Evidence—Directing Verdict.**

   Upon an issue in an action brought by the principal against his agent for embezzlement, or wrongful conversion and fraudulent misapplication of the proceeds from the sale of the plaintiff's stock, it is proper for the trial judge to direct a verdict in defendant's favor where all the evidence, both of plaintiff and defendants, tends to show that the defendants, though instructed to sell for cash, could not do so, and sold the stock for stock in another corporation in part and accepted for the balance cash orders on the corporation issuing the stock, this being deemed by them best for the interest of the principal under the circumstances, and they having received no benefit from the transaction.

2. Same—Worthless Stock—Measure of Damages.

An agent acting for the interest of his principal in the sale of stock in a corporation which turned out to be insolvent, in violation of an understanding between them that the sale was to be for cash, is not liable to the principal for the cash he was instructed to receive therefor when it appears that the stock could not be sold for cash, and that, acting for the principal as he deemed for his best interest under the circumstances, he took in payment for the stock a promissory note for the face value of the stock, which, without the agent's fault, proved to be worthless, the damages recoverable, at most, being confined to the value of the stock the agent was instructed to sell, which in this case turned out to be valueless.

3. Same—Notice—Waiver.

An owner of stock in a corporation, which subsequently proved to be valueless, requested D, the secretary of the corporation, and W, who had charge of the certificates, to sell it for him, which they undertook to do, with the understanding that the transaction was to be for cash. It proved that cash could not be obtained, and acting for the best interests of the principal, the agents negotiated a sale, which resulted in D giving his note for the full face value of the stock and taking a transfer of the certificates to himself, upon which the plaintiff still owed a large balance. The note thus taken was sent to the principal, who, after the corporation had gone into a receiver's hands, instructed the agent to prove his claim against it, which he did. Thereafter he instituted this action upon the note, after the maker had become insolvent, against him and the other agent, alleging, as to both, excess of authority and a fraudulent misappropriation of funds, etc.: *Held*, the plaintiff could only recover upon the note, as it appeared that he was benefited by transaction, being released from his stock subscription, and the circumstances were such as to put a prudent man upon notice that the stock had not been sold for cash, and further, that his subsequent conduct was a ratification of the act of his agents, which released them from liability.

APPEAL by plaintiff from *Lyon, J.*, at March Term, 1911, of STANLEY.

R. L. Smith and J. R. Price for plaintiff.
F. I. Osborne for defendant.

WALKER, J. Action to recover the sum of $1,200, alleged to be due by the defendants, as agents of the plaintiff, on account of a certain stock transaction.

In the year 1905 the plaintiff subscribed for sixty shares of the capital stock of the Vermont Mills, each share being of the par value of $100, on which he paid $1,200 in cash, and consequently owed $4,800. The plaintiff was an officer in the Vermont Mills, but desired to remove from Bessemer City, where the mills were located. He wished to sell out his interest in the stock, and requested S. J. Durham, one of the defendants in this case, who was treasurer of the mills, to make the sale for him, and Durham agreed to do so. S. J. Wilkins, the other defendant, had charge of the certificates of stock belonging to the plaintiff. The plaintiff authorized S. J. Wilkins to sell the stock for him, and S. J. Wilkins did sell it to one Coble. Wilkins, in payment for the stock, did not receive any money from Coble, but two notes, one for $500 and one for $400, on the Odell Mills. He further received an order for $300 on the Vermont, Southern, and Whetstone Mills, and another order for $300 to pay up the assessment due on the stock. After receiving these orders, he canceled the notes due by the plaintiff, and took the $500 and the $400 notes with the orders and presented them to S. J. Durham, who was the treasurer of the Vermont Mills. Durham asked for indulgence from Wilkins as to the payment, and Wilkins wrote to the plaintiff on 18 October, 1906, asking the plaintiff to make a draft of $1,200 on the Vermont Mills through the First National Bank at Gastonia at ten days sight, and stating that Durham had promised to pay the same. The plaintiff drew the draft, which was not paid at the end of ten days, because of the insolvent condition of the Vermont Mills, and Durham sent his individual note for $1,200, payable in sixty days, which the plaintiff accepted.

All three of the mills, together with the Odell Mills, failed shortly after the sending of the note, and their affairs were placed in the hands of a receiver. Durham failed, too, about the same time, inasmuch as he was interested in all of them. The plaintiff claims the right to recover $1,200 for the following reasons:

1. That defendants disobeyed his instructions, express or implied, and sold the stock on credit, whereas they should have sold it for cash, and by reason of their conduct in the transaction they are liable to him for its value.

2. That they made false and fraudulent representations to him as to the manner in which they had disposed of the stock, and he was led to believe by them that they had received cash for the same.

3. That they fraudulently converted the stock or the proceeds of it, and are thereby liable to him for the value thereof.

Defendants denied their liability upon any of the said grounds, and averred that, on the contrary, they had acted, not only prudently, but wisely, as it turned out, and that plaintiff had been greatly benefited by what they had done in his behalf. The court, at the close of the testimony, overruled defendants' motion for a nonsuit, and instructed the jury to answer the first two issues "Yes" and the fourth issue "No," according to the agreement of the parties, and upon the evidence to answer the third and fifth issues "No" and the sixth issue "Yes; S. J. Durham, in the sum of $1,200, with interest from 17 November, 1906." The jury thereupon returned the following verdict:

1. Did the defendants, or either of them, agree with the plaintiff to sell for him his twelve shares of stock in the Vermont Mills, Incorporated, at the price of $1,200 and remit the same to him? Answer: Yes.

2. Did defendants, or either of them, under said agreement, sell plaintiff's twelve shares of stock in the Vermont Mills, Incorporated, at the price of $1,200? Answer: Yes.

3. Have the defendants or either of them received $1,200 on account of said twelve shares of stock? Answer: No.

4. Have the defendants, or either of them, remitted or paid to the plaintiff the sum of $1,200 on account of said twelve shares of stock? Answer: No.

5. Have the defendants, or either of them, and if so, which one, embezzled, converted, or fraudulently applied or misapplied the proceeds from the sale of the plaintiff's stock? Answer: No.

6. In what amount, if any, are the defendants, or either of them, indebted to the plaintiff? Answer: Yes; S. J. Durham, in the sum of $1,200 and interest from 17 November, 1906.

Judgment was entered upon the verdict in favor of the defendants, and plaintiff appealed.

The material issues seem to be the third and fifth. As to the third issue, all the evidence goes to show that Coble did not pay any money at all for this stock—that is, that the defendants did not receive any money from him; so there could be but one answer to this question. Coble was a witness for the plaintiff and testified that he had paid for the stock as stated above.

As to the fifth issue, it is specifically charged in the eleventh paragraph of the complaint that these defendants received $1,200 as the proceeds of the sale of the stock, and this fifth issue is directed to that paragraph in the complaint and the answer to it, denying the same. The proceeds were alleged to have been received in cash, and inasmuch as no money was received, it could not have been fraudulently appropriated or embezzled; but giving to the fifth issue its broadest meaning, so that it will embody the question as to whether or not the defendants converted or fraudulently applied or misapplied any proceeds, whether money or not, realized from the sale of the plaintiff's stock, the defendants then contend that there was no evidence of such fraudulent conversion. The proceeds were two notes due by the Odell Mills and the orders set forth in the above statement of facts. These notes were carried to Durham, who was the treasurer of the mills, by Wilkins, and so were the orders, and Durham did not pay them, because the Vermont Mills did not have the money at that time with which to make the payment.

It is true that the sale, as contemplated by Osborne, the plaintiff, evidently was to be a cash transaction, and he undoubtedly thought so at the time, but Wilkins could not obtain the cash, and, as appears from the evidence, sold the stock in the manner which seemed to him best. There is no charge in the complaint, nor is there any issue with reference to such a charge, that Wilkins fraudulently disposed of the stock for his own benefit. The charge is that he, with the other defendant, converted, embezzled, or fraudulently applied the proceeds from the sale of the stock. There does not seem to be the slightest evidence that they made any such conversion or were guilty of any kind of fraudulent conduct.

The plaintiff, however, insists that he is entitled to a judgment against Wilkins, as well as Durham, for the $1,200. He did recover a judgment against Durham for $1,200 on the note which Durham gave him for his stock. The defendant Wilkins sent the paper to the plaintiff for $1,200, but did not receive any $1,200, and he had due authority to sell for the plaintiff, and received what, at the time, he thought was worth $1,200 and presented the claims to the proper party in order to collect them. They turned out to be of no value. If the plaintiff should be entitled to recover anything from Wilkins, it would be, at most, the value of his stock, that Wilkins disposed of for him; and from all the evidence, that turned out to be thoroughly worthless, as the Vermont Mills was at that time an insolvent institution. Neither one of these defendants realized a dollar in the transaction, and, as will appear by the entire evidence, were acting in the matter solely for the accommodation of the plaintiff.

The plaintiff was the gainer in the end, for he was indebted to the Vermont Mills in the sum of $4,800 for his unpaid subscription to the stock, and had it not been surrendered and canceled, the receiver could and would have obtained judgment against him to the full amount of the notes, for the benefit of the creditors of the Vermont Mills. By the transaction, these notes were canceled and the plaintiff ceased to be the debtor of the Vermont Mills, and Coble took his place and became responsible for the debt which plaintiff had owed for the stock.

Considering the whole case, we can find no evidence of any fraudulent conduct of the defendants in their dealings with the plaintiff's stock. The undisputed facts show that the defendants were not acting for themselves, with the view of benefiting by the transaction, but finding that they could not sell the stock for cash, and perhaps suspecting what subsequent events proved to be true, that the Vermont Mills were on the verge of insolvency, they did the best they could do to save the plaintiff, their principal, from the wreck, so that he would not suffer any pecuniary loss by the failure of the mills, and disposed of the stock to Coble. It was not very long before the wisdom of their course was justified by the real facts in the case. Durham came to the plaintiff's rescue, as far as he could do so, and gave his own note for the $1,200, which the plaintiff accepted. Misfortune overtook the defendant Durham when the mills failed, as he was largely interested in them and lost heavily, and he was unable to pay the note. Plaintiff has a judgment against him for the debt, and that is all to which he is entitled, notwithstanding the allegations of fraud, which have not been established.

There is another reason why the plaintiff is not entitled to recover anything more than the judgment of the court allows him. In the first place, the fact that Durham and Wilkins, his agents, had notified the plaintiff to draw on the Vermont Mills for the $1,200, which he did, the nonpayment of the draft and the taking of Durham's note were all circumstances reasonably calculated to put a prudent man upon notice that the sale had not been made for cash and to stimulate inquiry. It is a fact established in the case that Durham and Wilkins did not sell for cash, and Durham virtually so stated in his letter to plaintiff of 17 November, 1906. But after the latter had become fully acquainted with the fact that the Vermont Mills was his debtor, he agreed to accept Durham's note and to prove his claim against the insolvent mills and thus to get payment for his stock. This is shown by his letters of 11, 12, and 16 February, 1907, to Durham. These letters, which speak for themselves, are as follows:

Letter of 11 February, Osborne to Durham:

"I was under the impression that I held no claims against the Vermont Mills, but as you say in your letter dated 4th inst., that I have a claim, since I hold a note against you, I have no objection to you taking said claim in your hands and collecting what you can and crediting same on your note. If you wish me to file a claim against the mills, please notify me, and I will do so at once, and collect what I can and credit same on your note."

Letter of 12 February, Durham to Osborne:

"Your letter received. On receipt of your special-delivery letter, I certified and filed your claim as your attorney. I so understood your request. If the mill does not pay you in full, my note stands for the balance, as you state in your letter. Please let me know if I did as you wish in filing your claim."

Letter of 16 February, Osborne to Durham:

"Replying to your letter of recent date, will say that it is satisfactory to me, your putting in the claim as you have. I hope things will come out O. K. in our favor."

In the letter of 16 February he requests Durham to advance him $75 or $100, which he will credit on his note. This part of the correspondence, with other facts and circumstances, show a complete ratification, which, under the law, requires no new consideration. An act may be ratified by any words or conduct indicating an intention on the part of the person in question to adopt the act as his own. If ratification is made with knowledge of the facts, it invests principal and agent, as a rule, with the same rights and duties as if the transaction had been previously authorized, and when it takes place the agent is absolved from all responsibility on account of the unauthorized act or conduct, whether he exceeded or departed from his instructions, or was a mere volunteer. Tiffany on Agency, pp. 60, 86, and 87.

We will not again consider the fact that the stock was really valueless at the time it was sold to Coble. It was not only worthless, but its continued ownership would have subjected the plaintiff to a heavy loss, and even if the defendants violated instructions, he has lost nothing by their delinquency.

Our conclusion is that, in any view of the facts, the plaintiff was not entitled to recover any more than he did, and a substantial instruction of the court to this effect was correct.

No error.

W. H. CLARK, ADMINISTRATOR OF JOHN V. CLARK, v. BONSAL & CO. AND MARYLAND CASUALTY COMPANY.

(Filed 27 November, 1911.)

1. **Insurance — Indemnity — Contracts—Right of Action—Damages Sustained.**

   When a contract of indemnity is clearly against loss or damage, no action will lie in favor of the insured until some damage has been sustained, either by the payment of the whole or some part of an employee's claim.

2. **Same—Judgment.**

   If the stipulation in a contract of indemnity is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs, or, in some instances, when the amount and rightfulness of the claim has been established by judgment of some court having jurisdiction, this according to the terms of the policy.

3. **Same—Pleadings—Assignments—Insolvency.**

   When the contract of indemnity is taken out by the insured and appears to be for his protection, it is treated and dealt with as an asset of the insured employer, and in the absence of an assignment from him or allegation of insolvency, etc., an employee has no interest therein upon which he may proceed directly against the insurer for damages for a personal injury received by him, which was covered by the policy.

4. **Same—Equity.**

   An injured employee may not proceed originally against an indemnity company which has insured the employer against loss from such injury, in the absence of an assignment by the employer of the policy to him, except by attachment or bill in the nature of an equitable *fi. fa.*, or some action in the nature of final process incident to the bankruptcy or insolvency of the insured.

5. **Same—Parties.**

   An ordinary indemnity contract against liability for injury to the employees of the insured, as the one sued on here, is not for the benefit of the employee, either in its express terms or in its underlying purpose, but for the indemnity and protection of the employer against unexpected and uncertain demands, and the rights arising under the contract are his property, and actions to recover same are under his control.

6. Same—Pleadings—Demurrer.

A complaint which joins an indemnity company as a party defendant in an action for personal injuries sustained, and which was covered in the policy contract, sets forth no cause of action against the indemnity company, which alleges a contract between the defendants for the protection of the employer alone, without allegation of an assignment to the suing employee or insolvency of the employer, and a demurrer on the ground of misjoinder of parties should be sustained as to the defendant indemnity company.

APPEAL from *Justice, J.*, at April Term, 1911, of ANSON.

Civil action to recover damages for death of plaintiff's intestate, an employee of Bonsal & Co., caused by alleged negligence of the employer, and in which the Maryland Casualty Company was joined as an original party defendant, heard on demurrer for misjoinder of parties. The complaint sets forth a cause of action against Bonsal & Co. for negligently causing the death of intestate in the course of his employment with that company, and alleges that Bonsal & Co. held a contract of indemnity insurance with the casualty company, and makes the contract a part of the complaint. The complaint contained no allegations of insolvency on the part of Bonsal & Co. nor any facts, *ultra*, having a tendency to give the court jurisdiction in application or distribution of an insolvent's estate, nor was there allegation of assignment to plaintiff by the insured company. The right of joinder is made to rest on the terms of the policy, and the stipulations therein relevant to the questions presented are as follows:

"The casualty company guarantees the assured against loss from the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employee or official, or employee and officials, of the assured while the said employees or officials are engaged in the occupations and at the places mentioned in the schedule below; provided such bodily injuries or death are suffered as a result of accidents occurring within the period of twelve (12) months, beginning on the first day of December, 1908, at noon, and ending on the first day of December, 1909, at noon, standard time, at the place where the policy has been countersigned. . . . The company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person, is limited to five thousand dollars ($5,000), and subject to the same limit for each person, the company's total liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to more than one person, is limited to ten thousand dollars ($10,000). In addition to these limits, however, the company will, at its own cost (court costs being considered part thereof), investigate all accidents and defend all suits, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the same. . . . Immediate notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the home office of the company or its authorized representative. The company is not responsible for any settlements made or any expenses incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company, except that the assured may provide at the time of the accident, at the expense of the company, such immediate surgical relief as is imperative. In the event of an accident causing injuries to more than one person, the company may terminate its liability under this policy on account of such accident, by payment to the assured of its total limit of liability above named. . . . This policy may be canceled by either the company or the assured at any time by written notice to the other, stating when the cancellation shall be effective."

The court below sustained the demurrer and dismissed the action as to the casualty company, and plaintiff, having duly excepted, appealed.

Lockhart & Dunlap and Robinson & Caudle for plaintiff.
McLean, Varser & McLean and Murray Allen for defendant.

HOKE, J., after stating the case: In construing contracts of this character, the courts have generally held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured till some damage has been sustained, either by payment of the whole sum or some part of an employee's claim; but if the stipulation is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs or, in some instances, when the amount and rightfulness of the claim has been established by judgment of some court having jurisdiction—this, according to the terms of the policy; but, unless the contract expressly provides that it is taken out for the benefit of the injured employees and the payment of recoveries by them, none of the cases hold that an injured employee may, in the first instance, proceed directly against the insurance company. In all of them, so far as examined, a right of action arising on the policy is treated and dealt with as an asset of the insured employer, and, in the absence of an assignment from him, the employee cannot appropriate it to his claim, except by attachment or bill in the nature of an equitable *fi. fa.* or some action in the nature of final process, incident to bankruptcy or insolvency. Certainly this position is supported by the great weight of authority: *Connoly v. Bolster*, 187 Mass., 266; *Bain v. Atkins*, 181 Mass., 240; *Embler v. Hartford Boiler Co.*, 158 N. Y., 431; *Cushman v. Fuel Co.*, 122 Iowa, 656; *Hawkins v. McCalla*, 95 Ga., 192; *Carter v. Insurance Co.*, 76 Kansas, 275; *Finley v. Casualty Co.*, 113 Tenn., 592; *Keenan v. Casualty Co.*, 107 Ill. App., 406; Vance on Insurance, p. 608; 15 Cyc., p. 1038; 11 A. and E. (2d Ed.), p. 16.

The doctrine, as announced and sustained in these citations, is very well epitomized in Vance on Insurance as follows:

"The fund payable under a liability policy is not subject to any trust in favor of the person whose right to damages for personal injury gave rise to the insurer's liability, nor has such third person any other right in connection with the insurance, save the common right of reaching the fund, when payable, by garnishment or other proper process."

The cases from other courts, chiefly relied upon by plaintiffs, are not, necessarily, in conflict with this position. In *Fritchie v. Millers Co.*, 197 Pa. St., 401, and *Hoven v. Employer's Liability*, 93 Wis., 201; *Anoka Lumber Co.*, 286, judgment had been first obtained against the employer, and garnishment was issued against the company. In *Sanders v. Frankfort Insurance Co.*, 72 N. H., 485, judgment was first obtained and the action was in the nature of an equitable *fi. fa.* seeking to appropriate claim as the property of the insured, and in *Insurance Co. v. Moses,* 63 N. J. Eq., 260, the insured employer had become bankrupt, and appropriation was had, to an amount of loss, as indicated by a pro rata distribution of the other assets among the creditors; reversing, in this respect, a decree of the vice chancellor, in which the entire amount of claim had been held applicable to injured employee's recovery. See same case, 61 N. J. Eq., 59. What amount may be recovered on proceedings of garnishment or bill in aid of collecting the judgment will depend on the nature of the stipulations of indemnity and the facts and circumstances of the particular case. Thus, when, as in the Massachusetts and Tennessee and Iowa cases, *supra,* the policy is clearly an indemnity against "loss actually paid" by the assured "to reimburse him for a loss actually sustained and paid in satisfaction of a judgment after the issue determined," the language in the Iowa case, *supra,* and it appears that there has been nothing paid, it seems that no amount is applicable. In the New Jersey case, as stated, on similar stipulations, it was finally held that the loss would be considered paid by the insured and recoverable from the company to the amount indicated by the pro rata distribution of the other assets, etc. In the Minnesota and New Hampshire cases, *supra*—and we incline to the opinion that the present policy comes within the principle—it was held that the terms, "insured against loss from liability arising," etc., in the first portion of the policy, was so modified by subsequent clauses that it amounted to insurance against liability, and the entire amount could be applied to the employer by appropriate process—process that recognizes and deals with it as an asset of the employer. The cases in our own Court, to which we were especially referred by counsel, do not sustain his contention. In *Aiken v. Manufacturing Co.,* 141 N. C., 339, in which the Court said that a casualty company, while not a necessary, was a permissible party, the policy was not before the Court or made part of the record. The allegation concerning it was to the effect that the employer had a policy and stipulations to indemnify it against "all injuries to any of its employees, including the plaintiff, and to pay any sum that might be recovered by any of said employees, including the plaintiff," a direct stipulation to pay the recovery sought in the action. In case of *Shoaf v. Frost,* 127 N. C., 306, a policyholder in a fire insurance company brought his action directly against a reinsuring company, and the decision was made to rest on the ground that, by the express terms of the agreement, the reinsuring company was to pay the losses on policies already issued, and so, as between the two contracting parties, became the principal debtor, and on the further ground that the property of the original company, as part of the consideration, was assigned and transferred to the company sued, as it was in *Johannes v. Insurance Co.,* 66 Wis., 50, a case cited and relied on in the Shoaf decision. And so, in all the decisions cited by plaintiff, where the claimant was allowed to sue the indemnitor, by direct action, the contract, either in express terms or by fair intendment, was made for the benefit of the plaintiff, as in *Gorrell v. Water Supply Co.,* 124 N. C., 328, or by the nature of the contract or by virtue of property passed and the attendant facts the party assumed towards the other the place of primary debtor, and was held bound to plaintiff, under the general equitable principles of *indebitatus assumpsit,* as in *Keller v. Ashford,* 133 U. S., 610; *Vorhees v. Porter,* 134 N. C., 591, or the bond taken under statutory provision was for the benefit of claimant, or the action was permissible in tort for wrongful seizure of property and the bond of indemnity constituted the obligor a participant in the wrong; but no such facts are presented here. An ordinary indemnity contract of this character is not made for the benefit of the employee, either in its express terms or in its underlying purpose. It is made for the protection and the indemnity of the employer, fortifying him against unexpected and uncertain demands which might otherwise prove disastrous to his business, and the rights arising under such a contract are his property, and actions to recover the same are and should be under his control. The nature of the contract and the principles applicable are well stated in one of the Massachusetts cases, above cited, *Bain v. Atkins,* as follows:

"The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins." This being the correct position, the complaint as it now stands sets forth no cause of action against the insurance company, nor does it contain facts giving plaintiff any present right to recover against it nor to have judgment in any way directly affecting its rights. The principle is very well stated in 30 Cyc., p. 125, as follows: "It is not sufficient reason for joining a person as defendant that the adjudication of the case at bar may determine points of law adversely to its interests. As a rule, the record must show a responsible interest in all the defendants," citing among other cases *Conkling v. Thruston and others*, 18 Ind., 290; *U. S. v. Pratt Coke and Coal Co.*, 18 Fed., 708.

In our opinion, the casualty company has no interest or place in this controversy, and the judgment of his Honor, sustaining the demurrer, must be

Affirmed.

GULF REFINING COMPANY v. CHARLOTTE CONSTRUCTION COMPANY.

(Filed 27 November, 1911.)

1. **Contracts, Written—Intent—Conflicting Terms—Interpretation.**

   Terms of a written contract will not be construed as conflicting so as to eliminate some of them subsequently expressed as conflicting with the others, when from the intent of the parties, as gathered from the entire instrument, they can reasonably be reconciled and construed together.

2. **Same—Goods Sold and Delivered—F. O. B. Destination—Liability for Carrier's Delays.**

   In an action to recover the price of goods sold and delivered, the defendant set up a counterclaim for failure of the plaintiff to deliver them in a certain time in accordance with the terms of a written contract, specifying delivery f. o. b. at defendant's plant in C. at a certain price, and stipulating that the liability of plaintiff ceased when shipment was delivered by it to the common carrier: *Held*, the provision that the plaintiff's liability should cease upon the delivery to the carrier was not irreconcilable with the agreement that delivery should be f. o. b. at defendant's plant at C. at a certain price, it appearing by construction of the entire contract of sale that it was the intent of the parties that the plaintiff would not be responsible for the delays in delivery by the carrier, and that no title to the goods would pass to the defendant and no charge therefor could be made by the plaintiff until the delivery at the specified point had been made.

APPEAL from *Biggs, J.*, at May Term, 1911, of MECKLENBURG.

Civil action, heard on case agreed. Plaintiff sued defendant for $122.41 purchase price of oil sold and delivered to defendant as per contract, etc.

Defendant admits owing plaintiff the amount stated, a balance due for oil sold and delivered, but sets up a counterclaim for something over $100 arising by reason of plaintiff's wrongful failure to deliver two car-loads of oil at the time and place required by the contract between them, whereby defendant was forced to buy a specified amount of oil on the local market at an increased cost, etc. The facts admitted as relevant to this counterclaim are very well stated in one of the briefs, as follows:

"That on 25 November, 1905, plaintiff and defendant, Charlotte Consolidated Construction Company, entered into a contract whereby plaintiff agreed to sell and deliver to defendant, Charlotte Consolidated Construction Company, and the defendant, Charlotte Consolidated Construction Company, agreed to purchase from the plaintiff Solar Gas Oil for use in defendant's plant in the city of Charlotte. The price was to be 5¼ cents per gallon f. o. b. Charlotte, N. C., in lots not less than 160 barrels nor more than 320 barrels, unless otherwise agreed upon. Five days written notice to be given plaintiff or its representatives, at 916 Harrison Building, Philadelphia, Pa., before each delivery was required; payment to be made on the 15th day of each month, at plaintiff's Pittsburg office, for all oil delivered during the preceding month, and liability of plaintiff to cease when any shipment was delivered to the railroad. That said contract was carried out by the parties, until 17 October, 1906, at which time defendant, Charlotte Consolidated Construction Company, telegraphed plaintiff to ship two cars of oil on the 20th day of said month, instead of one, which telegram was subsequently confirmed by letter from defendant, Charlotte Consolidated Construction Company, to plaintiff, and plaintiff, in accordance with said telegram, on 20 October, 1906, delivered to the Central Railroad of New Jersey the two tank cars of oil, consigned to defendant, Charlotte Consolidated Construction Company, Charlotte, N. C., and took bill of lading for the same and sent the bill of lading to the defendant, Charlotte Consolidated Construction Company, Charlotte, N. C.; that on account of an error committed by the railroad company, said oil was never delivered, but was carried to Courtland, New York, and discharged in the tanks of other persons; but the error was not made known to plaintiffs till 2 November, 1906, when defendant, Charlotte Consolidated Construction Company, by its president, E. D. Latta, wired plaintiff that the oil had not arrived, and ordered shipped at once two other cars of oil, which were shipped on 2 November, 1906, according to instructions of defendant, Charlotte Consolidated Construction Company. Before the second shipment of oil arrived at Charlotte, defendant's supply of oil gave out, and it was compelled to buy 11,429 gallons of kerosene oil from the Standard Oil Company, at the price of $1,108.78, which oil so used by the defendant refining company in the manufacture of its gas was worth only $702.26, as compared with the value of the Solar Gas Oil for like purposes, incurring a loss to defendant of $406.52.

"Defendant admits that there is due plaintiff the sum of $422.41, with interest from 19 January, 1907, subject to such set-off or counterclaim (if any) as the defendant ought to have credit for by reason of the failure to deliver the two cars or tanks of oil which were, by error of the Central Railroad of New Jersey, carried to Courtland, New York, and not delivered to defendants.

"The question of the amount sought to be recovered being eliminated by the defendant's admission, the inquiry before the court is, whether or not the loss sustained by defendant, being the relative difference in the value of Solar Oil and kerosene oil, is a proper counterclaim against the plaintiff."

The court below being of opinion that on the facts there was no counterclaim available to defendant, entered judgment for plaintiff, and defendant excepted and appealed.

Clarkson & Duls and W. F. Harding for plaintiff.
E. T. Cansler for defendant.

HOKE, J., after stating the case: As the Court understands the facts, there has been no charge made against defendant for the price of oil that was shipped to other parties by mistake of the railroad company and its agents. The defendant bases its counterclaim on the fact there was a failure to deliver the two car-loads of oil at the time and place specified; that this failure was in breach of the contract between the parties, and the consequences are properly chargeable to plaintiff, and this by reason of certain clauses in the agreement, as follows:

"That plaintiff sold and agreed to deliver to defendant for use in defendant's plant at Charlotte, N. C., maximum 225,000, minimum 175,000 gallons Solar Gas Oil at 5¼ cents per gallon,

f. o. b. Charlotte, N. C., by *tank car,* at *tank located at Charlotte, N. C.,* in lots of not less than 160 barrels nor more than 320 barrels, unless otherwise agreed upon. . . .

"Five days written notice to be given representative of party of first part (plaintiff) at 916 Harrison Building, Philadelphia, Pa., before each delivery is required. . . .

"Liability of first party (plaintiff) ceases when shipment is delivered to railroad company."

The position being that the last clause, "Liability of the first party ceases when shipment is delivered to railroad company," is entirely irreconcilable with the two former clauses, is repugnant to the general purport and intent of the contract, and under the doctrine approved in *Jones v. Casualty Co.*, 140 N. C., 262, and other cases of like import, the same should be set aside and not allowed to affect in any way the rights of the contracting parties. But on the facts in evidence the Court is of opinion that defendant's counterclaim may not be brought within the principle.

In *Railroad v. Railroad*, 147 N. C., 382, the Court, speaking to the controlling rule in the interpretation of contracts, said: "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument. In Paige on Contracts, sec. 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' "

And in *Davis v. Frazier*, 150 N. C., 451, the Court, referring to the principle recognized in *Jones v. Casualty Co.* and other cases of like kind, said: "It is an undoubted principle that a 'subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside.' This was expressly held in *Jones v. Casualty Co.*, 140 N. C., 262, and there are many decisions with us to like effect; but, as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co., supra;* Lawson on Contracts, secs. 388, 389; Bishop on Contracts, secs. 386, 387."

The opinion then quotes with approval from Lawson on Contracts as follows: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. . . . Courts will examine the whole of the contract and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose and has its office to perform. So, where two clauses are inconsistent they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

These cases and the principle upon which they rest were again stated with approval in a decision by *Mr. Associate Justice Allen* in *Hendrix v. Furniture Co.,* 156 N. C., 569.

While the rules of interpretation insisted on by defendant's counsel are correct as general propositions, and the authorities cited in his learned argument are apt to support them in proper cases, they are subordinated to the general principle recognized in the decisions cited, and correctly applying the same to the contract in question, there is no such conflict in the last clause of the agreement as requires or permits that it be rejected as meaningless. But on perusal of the entire instrument, we think it clear that the oil was to be delivered at the tank of defendant company at Charlotte, N. C.; that title did not pass and no charge for the oil could be made till such delivery, but at the price agreed upon, 5¼ cents per gallon, the party of the first part was not willing to stand for delays in shipment on the part of the railroad company, and in that view the final clause was inserted, "Liability of party of first part ceases when shipment is delivered to railroad company."

This construction gives reasonable significance to all parts of the contract, harmonizes the different clauses, and is in accord with the rules of interpretation which we have approved and hold to be controlling on the facts presented.

There is no error, and the judgment below is affirmed.

No error.

R. L. COLTRANE v. S. W. LAUGHLIN, ADMINISTRATOR, S. L. COLTRANE, ET AL.

(Filed 27 November, 1911.)

1. **Courts—Jurisdiction—Pleadings—Judgment—Estoppel.**

   When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing.

2. **Same—Tenants in Common—Contracts to Convey—Deeds and Conveyances.**

   In special proceedings for partition of lands by tenants in common, left them under the will of their father as remaindermen after the life estate of their mother, one of them set up a parol contract alleged to have been made by the others, to convey the lands upon consideration of his having moved upon the lands and taken care of the mother during her lifetime, and the issue thus raised was transferred to the civil-issue docket, and an order of reference made, whereupon it was found that no such contract was made, and it was so adjudged, and judgment duly entered, that the claimant account for the rents and profits for the time he was in possession cultivating the land, and that he recover a certain sum of money, which was the difference between this and the value of the improvements he had put upon the lands: *Held*, the tenant setting up the contract was estopped by the former judgment from suing to recover damages for breach of the alleged contract to convey the lands, and to condemn and apply the proceeds of a sale thereof to satisfaction of such damages; for while it may not have been necessary in the former action for the plaintiff in this one to have alleged the contract in order to recover for permanent improvements, it was included in the scope of the former inquiry and concluded by the judgment therein.

3. **Clerks of Courts—Jurisdiction—Equity—Transfer to Term—Superior Courts.**

In special proceedings for the partition of lands by tenants in common, wherein one of them asks for specific performance by the others of a contract to convey their interests therein, the clerk of the court may not grant the equitable relief sought, but upon his transferring the issue to the civil-issue docket, the Superior Court has the acquired jurisdiction to determine the question thus presented and to afford adequate relief.

4. **Reference—Scope of Order—Admissions—Defect Cured—Tenants in Common.**

A tenant in common resisted the partition of the lands in controversy upon the grounds of an alleged contract made by the others to convey their interest to him, which the clerk transferred to the civil-issue docket, whereupon it was referred and the referees' report confirmed and judgment duly entered, after all objections to the report had been withdrawn: *Held*, in this case the matters embraced in the pleadings were within the purview of the order of reference, except the tenancy in common, and the necessity of sale of the lands, which were admitted, and as all exceptions to the report were withdrawn, any defect in the order of reference, if it existed, is cured.

5. **Tenants in Common—Plea—Sole Seizin—Jurisdiction—Ejectment—Procedure.**

In proceedings by tenants in common for partition of lands, a plea of sole seizin by one of them may be entered before the clerk, and on transfer to the court in term, the issue will be determined as in an action of ejectment.

6. **Tenants in Common—Contract to Convey—Issues.**

In proceedings for partition of lands by tenants in common, a contention by one of them that the others had contracted to convey their interests therein to him, which is denied, directly involves the existence of the contract on an issue as to the fact of the tenancy in common.

APPEAL from *Daniels, J.*, at July Term, 1911, of RANDOLPH.

Civil action to recover damages for breach of contract to convey land and to condemn and apply the proceeds from a sale of real estate to satisfaction of the damages alleged to be recoverable.

Defendants denied the existence of the contract and pleaded an estoppel of record against recovery by reason of a judgment on action commenced before the Clerk of Randolph County as a special proceeding to sell land for division among tenants in common, transferred on issues joined to the Superior Court of Randolph County and determined there by judgment on report of referee, duly entered in Superior Court of said county, July Term, 1909, as follows:

Superior Court of Randolph County, July Term, 1909.

This cause coming on for a hearing upon exception to report of referee, all exceptions are withdrawn and it is adjudged that the report of referee be in all respects approved and confirmed. The referee allowed a fee, etc.

(Signed) B. F. LONG, *Judge Presiding.*

On the present trial his Honor, reserving the question of estoppel, submitted issues, and the following verdict was rendered by the jury:

1. Did the plaintiff and S. L. Coltrane enter into the contract alleged in the complaint? Answer: Yes.
2. Did the plaintiff comply with the terms of said contract, as alleged in the complaint? Answer: Yes.

And the court being of opinion on the question reserved that there was no estoppel of record shown, and the amount of damages, if any due, having been admitted, entered judgment for plaintiff, and defendants excepted and appealed.

J. A. Spence for plaintiff.

Sapp & Williams and Morehead & Morehead for defendant.

HOKE, J., after stating the case: On the question of estoppel it was made to appear by admission and the inspection of the record chiefly that "In the year 1866 or 1867 Abner Coltrane died in Randolph, seized of a tract of land containing 111 acres, leaving a widow and three children, his only heirs at law, to wit, the plaintiff R. L. Coltrane, S. L. Coltrane, and Ruth Gardner; S. L. Coltrane, then a nonresident, having moved from this State while a minor. Mrs. Gardner left the State soon after her father's death. The plaintiff moved in with his mother immediately after the death of his father and resided with her till she died—about forty years—raising a family while so living with her and repairing and putting improvements upon the premises. In May, 1906, soon after the death of the life tenant, his mother, the plaintiff instituted a special proceeding in Superior Court of Randolph County to sell the land for division, against S. L. Coltrane and Mrs. Gardner, she being a widow, and in the complaint made a claim for an allowance by reason of permanent and valuable improvements put upon the land during his occupation, and basing his claim also on separate and specific allegations made in terms as follows: "That just after the death of the said Abner Coltrane, the defendants contracted and agreed with the plaintiff that he should move on said lands and take care of his mother, and in consideration of his taking care of his mother, who was also the mother of the defendants, that the said petitioner should have their interest in the lands aforesaid; that in pursuance of the aforesaid agreement the said R. L. Coltrane did move on said lands and carried out his part of the aforesaid agreement in spirit and letter by taking care of his mother, who died a year or two ago; that while in possession of said lands under the aforesaid agreement and as tenant in common the petitioner put valuable and permanent improvements on said lands, to wit, dwelling-house, barn, granary, smokehouse, and the digging of a well and other things, worth in all $500 to $600; and the said petitioner is advised and believes that he should be paid for the value of said improvements before the defendants are allowed anything from the proceeds of said sale."

Defendants S. L. Coltrane and Mrs. Gardner made answer, alleging that they were tenants in common with plaintiff; denied there was ever any contract to convey their interest to plaintiff; alleged that rents and profits received should be accounted for as against the claim for permanent improvements and amount if any due defendants paid, and prayed judgment that the land be sold for division, etc.

The cause was transferred to civil-issue docket, and S. L. Coltrane having died, his heirs at law were duly made parties defendant, and at March Term, 1908, an order of reference was made, containing the following recitals: "This cause being called for trial, and it appearing to the court that the plaintiff alleges that he and the defendants are tenants in common, and which is admitted by the defendants, and both parties in open court having agreed that the land described in the petition should be sold and that the questions raised by the pleadings should be referred." And after directing a sale, the said order proceeded: "And the said referee is hereby ordered to hear evidence as to the increased value of said land because of any improvements, if any, placed upon said land by any of the parties thereto, and ascertain and find the value of the same, and also to hear evidence as to the rental value of said land and to find what the rental value of said land amounts to, and also to find from the evidence whether or not the plaintiff should be paid for his improvements, and, if so, how much, and whether or not the plaintiff should account for rents and profits arising from this land, and, if so, what amount."

Said referee made his report to July term, finding facts specially relevant to this inquiry as follows:

1. That the plaintiff R. L. Coltrane moved on the tract of land described in the complaint in the year 1867, and has lived thereon continuously to the present.

2. That there was no contract between plaintiffs and defendants that the plaintiff should have the land in consideration of his moving there and taking care of his mother.

3. That the said R. L. Coltrane resided on and cultivated only that part of the land which was embraced in his mother's dower, which had been allotted, covering a portion of said tract of land.

4. That his mother, the dower tenant, died in January, 1905, since which time the plaintiff has been receiving the rents and profits of the place.

The report then proceeds to state the account, and as a conclusion of law awards plaintiff the sum of $300 over and above rents for which he was properly chargeable, which said sum was first allowed plaintiff from the proceeds of sale. Judgment was entered confirming report as heretofore shown, and Mrs. Gardner having received her share of this money and defendant McLaughlin having duly qualified as administrator of S. L. Coltrane, deceased, plaintiff instituted the present action against him and the children, heirs at law of S. L. Coltrane, to recover damages for breach of the contract to convey the land and condemn and apply the share belonging to estate of S. L. Coltrane to payment of same.

Upon these, the controlling facts relevant to the inquiry, we are of opinion that plaintiff is concluded as to the existence of the contract upon which he brings suit, and that no recovery may be had thereon.

It is well recognized here and elsewhere that when a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined on the hearing. *Gilliam v. Edmonson,* 154 N. C., 127; *Tyler v. Capehardt,* 125 N. C., 64; *Tuttle v. Harrell,* 95 N. C., 456; *Fayerweather v. Ritch,* 195 U. S., 277; *Aurora City v. West,* 74 U. S., 82, 103; *Chamberlain v. Gaillard,* 26 Ala., 504; 23 Cyc., p. 1502-4-6.

In *Capehardt's case, supra,* it was held: "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings."

In *Fayerweather's case* it was held: "Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present, their evidence, and the question was decided by a court of competent jurisdiction, private right and public welfare both demand that the question so adjudicated shall, except in direct proceedings for review, be considered as finally settled and conclusive upon the parties."

In *Aurora City v. West, supra,* it is said: "The better opinion is that the estoppel when the judgment was rendered on its merits, whether on demurrer, agreed statement, or verdict, extends to every material allegation or statement, which having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings. *Associate Justice Miller* dissented in the case, on the ground that the decision was in some respects too broad, but he gave full adherence to the proposition here stated, as follows: "It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered as concluded by that suit; but this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is that when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decreed in the first suit or be made to appear by extrinsic proof that it was in fact decided."

In the proceedings relied upon by defendant it may not have been essential to plaintiff's recovery for permanent improvements to allege that there was a contract to convey him the land, but he alleged the existence of such a contract and made the same a basis for such recovery; issue was joined thereon by express averment; the matter was fully investigated and the facts determined against him, and under the doctrine of estoppel as recognized and instanced in the authorities cited, plaintiff is and should be concluded.

It was objected on the argument that the clerk had no jurisdiction to award the equitable relief by decreeing specific performance, and the position might be maintained if the proceedings had remained before him; but on issues joined the cause was properly removed to the Superior Court in term, and under the provisions of our statute that court had full jurisdiction to determine all questions presented and afford adequate relief. Revisal 1905, secs. 614, 717; *Oldham v. Rieger,* 145 N. C., 254; *Foreman v. Hough,* 98 N. C., 386.

It was further insisted that the referee was not authorized to consider and pass upon the existence of the contract, and so the question was not properly presented in the former proceedings. We do not take this view of the order of reference. Paying due regard to the preliminary recitals, we think that all matters embraced in the pleadings were within the purview of the order except the tenancy in common and the necessity for a sale, both of which were admitted; but conceding that the question was not within the terms of the order, it was fully investigated and determined. All exceptions to the findings of the referee withdrawn and the report in all respects approved and confirmed. Any defect in the order of reference, if it existed, is thereby fully cured. *Morris v. Haas,* 54 Neb., 579.

Apart from all this, it has always been held that in proceedings for partition a plea of sole seizin could be entered before the clerk, and on transfer to the court in session that this issue would be determined as in an action of ejectment. *Purvis v. Wilson,* 50 N. C., 22.

In the original proceedings, while inconsistent with the other portion of his pleading and the prayer for relief, the allegation of plaintiff's petition amounted in substance to this, that he had a contract with defendants, his brother and sister, that they would convey him the land for taking care of his mother, and that he had paid the price. If this was established, defendants had no interest, and, recognizing this, they joined issue on these averments, denied the existence of the contract, and alleged that they were tenants in common, and asked for a sale. In this view, the existence of the contract was directly involved in the issue as to tenancy in common, and in any event the plaintiff should be estopped by the judgment. *Carter v. White,* 134 N. C., 466; *Weeks v. McPhail,* 129 N. C., 73.

There is error, and on question reserved judgment must be entered for defendant.

Reversed.

W. G. HALL v. W. W. PRESNELL AND E. F. LOVELL ET AL.

(Filed 27 November, 1911.)

1. **Principal and Surety—Attorney at Law—Collection of Debt—Extension of Time—Authority Implied.**

An attorney employed simply to collect a note has no authority to extend the time for its payment so as to release the other parties bound thereon, or to do any act which will jeopardize his client's interest. An attorney can only collect in cash, and, without express authority or conduct equivalent to authority, cannot temporize with the debtor to the prejudice of the creditor.

2. **Same.**

An accommodation paper with sureties was deposited by the payee with a bank as collateral to a note given the bank for a loan to him. At the request of one of the sureties, the maker of the collateral note gave a chattel mortgage to the payee thereof to secure the debt and indemnify the sureties, which was duly registered. The bank sent the note made to it, with the collateral, to an attorney for collection, who allowed the maker of the collateral note several days in which to sell the mortgaged chattels and pay the note, but subsequently sold them under the mortgage and applied the proceeds to the payment of the note, which proved to be insufficient for the purpose: *Held*, the act of the attorney in granting the maker of the collateral note time in which to sell the mortgaged chattels and pay the note did not operate as a discharge of any of the parties.

3. **Attorney and Client—Principal and Agent—Waiver of Client's Rights—Ratification—Estoppel.**

As a general rule, an attorney cannot waive any of the substantial rights of his client without the latter's consent, and he is not bound by the attempted waiver, unless there be a ratification, or something which amounts to an estoppel.

APPEAL by defendants from *Long, J.*, at Spring Term, 1911, of WATAUGA.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

No counsel for plaintiff.
Edmund Jones for defendant.

WALKER, J. There is but one question in this case. On 5 November, 1906, G. W. Presnell made his note to W. G. Hall for $135.96, payable 1 May, 1907, and indorsed by W. W. Presnell and E. F. Lovell as sureties. This note was deposited by Hall with the Bank of Blowing Rock, as collateral security for a debt he owed the bank. Presnell, at the request of Lovell, gave a mortgage to Hall for $120.70 on a pair of horses, to secure the debt and indemnify his sureties, and it was duly registered. The note and mortgage were placed in the hands of an attorney for collection and he immediately pressed the defendants for payment. Lovell requested the attorney to take immediate steps to secure possession of the horses, for the purpose of selling them, we assume, under the power contained in the mortgage, and gave him $5 to pay his expenses. The attorney demanded the horses of Presnell, the debtor, who asked indulgence for several days, so that he might dispose of the horses and pay the debt, which was granted, and Presnell paid the attorney $5 for his expenses. The attorney afterwards sold the horses, but did not realize enough to pay the debt, and meanwhile Presnell left the State. W. G. Hall had no knowledge of the transactions between the attorney of the bank, and of course did not authorize the extension of time, nor did the bank. It was simply a slight accommodation given by the attorney to Presnell on his own responsibility, and without any express authority or any ratification afterwards of his act. It does not appear whether or not Presnell was solvent at the time the attorney granted the slight indulgence to him, and has remained so to this time, nor does it appear distinctly that the attorney extended the time for paying the debt, but it rather appears that the short extension was restricted to the time of seizing and selling the horses under the mortgage. Upon the facts admitted by the parties, the court rendered judgment for the plaintiff, and the defendant Lovell appealed.

We think the decision of the court below was right. It is not clear to us how the appellant was injured by the transaction of which he complains, but assuming that it was such an extension of the time for paying the note as would have discharged him, as surety, if it had been given by the plaintiff, we are of the opinion that the attorney had no express or implied authority to bind his client, the bank, or Hall, the payee, by the agreement. He was retained to collect the debt and not to release it or any party liable to Hall or the bank for its payment, and any one dealing with him was fixed, in law, with notice of this lack of authority. As said in *Bank v. Hay,* 143 N. C., 326: "There is a general rule that, when one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule, it is said, every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes, before he closes the bargain with him. *Biggs v. Insurance Co.,* 88 N. C., 141; *Ferguson v. Mfg. Co.,* 118 N. C., 946."

No one could reasonably suppose that it was within the scope of an attorney's authority to release a debt or any party to a note, or to do anything which would have that effect, when his commission extended only to the collection of the debt. It is stated in the books that an attorney has no implied authority to work any discharge of a debtor but upon actual payment of the full amount of the debt, and that in money. He cannot release sureties or indorsers nor enter a *retraxit,* when it is a final bar (*Lambert v. Sanford,* 3 Blackford, 137), nor release a witness (*Ward v. Hopkins,* 2 Pen. (N. J.), 689; *Campbell v. Kincaid,* 3 Mon., 566), nor a party in interest (*Succession of Wright,* 18 La. Ann., 49). It is a general rule that an attorney, who in many respects is considered as a mere agent, cannot waive any of the substantial rights of his client without the latter's consent, and in such a case he is not barred thereby without ratification, or something which amounts to an estoppel, to deny his attorney's authority. These principles will be found to be sustained by the following authorities: Weeks on Attorneys, sec. 219, and cases cited in the notes; *Savings Inst. v. Chinn,* 70 Ky. (7 Bush.), 539; *Ireland v. Todd,* 36 Me., 149; *Givens v. Briscoe,* 3 J. J. Marsh. (Ky.), 529; *Union Bank v. Goran,* 10 Sm. and M. (Miss.), 333, and cases cited; *Tankersley v. Caruth,* 4 So.

Ca. (4 Des. Eq.), 44; *Terhune v. Cotton,* 10 N. J. Eq. (2 Stock. Ch.), 21. It was directly held in *Roberts v. Smith,* 3 La. Ann., 205, that an attorney at law, in whose hands a note has been placed for collection, has no power, by an agreement made out of court without authority of his client, to give an extension of time to the principal obligor which would have the legal effect, if the act were valid, to relieve or discharge a surety on the note. Of like effect is *Varnum v. Bellamy,* 4 McLean, 87 (*s. c.,* 28 Fed. Cases, p. 1096, No. 16), 886. In *Savings Inst. v. Chinn, supra,* it was held to be well settled that an attorney at law, employed to collect a debt, has not authority to release the sureties upon his client's claim, either directly or indirectly, nor to do any act, with reference thereto, prejudicial to his interest. "No implied power (of an attorney) exists, under a general retainer, to grant additional time to his client's debtor" (4 Cyc., 945), "nor has an attorney the implied power to release his client's claim, and where there is security for the demand, he cannot surrender it to his client's detriment, nor has he implied authority to release sureties on an obligation to his client." 4 Cyc., 949, and the numerous cases cited. In *Kellogg v. Gilbert,* 10 Johns., 220, the sheriff, upon the request of the plaintiff's attorney, permitted the defendant, in custody on a *ca. sa.,* to go at large for the purpose of securing money with which to pay the debt. It was held that the attorney had no authority to order the release of the defendant without the plaintiff's consent or a previous satisfaction of the debt, and that the sheriff was, therefore, liable for an escape. See, also, *Lewis v. Gamoge,* 18 Mass. (1 Pick., 2 Ann. Ed.), 346, and cases cited; *Simonton v. Barrell,* 21 Wendell, 362; *Jackson v. Bartlett,* 8 Johnson (3 Ed.), marg. p. 361. *Justice Patteson* said, in *Savory v. Chapman,* 39 E. C. L., 242 (11 Ad. Ell., 829): "It is clear that the attorney could not, of his own authority, without payment, discharge the defendant out of custody as a matter of indulgence; nor indeed is it contended that he could. Either the money must have been actually paid or the plaintiff (himself) must have chosen to show favor; that would be his act. The plea does not allege either fact. It is true that if the attorney has power to receive the money, he may, having received it, order a discharge; but then, in pleading the discharge, it should be shown that the money was paid. So if the plaintiff chose to dispense with the further detention, it should have been alleged that he authorized the attorney to discharge," and *Justice Coleridge*, in the same case, said: The party "is bound to know the legal qualifications of persons filling certain employments. The question, therefore, turns on the authority of the attorney; and there is nothing here to show that he had any, either in his general character or with reference to the circumstances of the suit. He could, as it appears here, be only an agent *de facto;* and there is nothing shown to make him one for the present purpose." It seems, therefore, to be the generally accepted doctrine that an attorney, charged with the collection of a debt, has no power, in virtue of his general authority, to do any act which will either release his client's debtor or his surety, or substantially jeopardize his interests in any way.

The cases cited by the learned counsel of the appellant are not in point. There the question was as to the authority of an attorney, in the actual conduct of a suit in court, whether in prosecution or defense, and in matters of practice and procedure, as in *Black v. Bellamy*, 93 N. C., 129, the case cited by appellant's counsel. *Chief Justice Smith* thus refers to the subject: "The conduct of the case by caveators' counsel would, in the absence of connivance, be binding upon their clients, and it would be a dangerous innovation in judicial proceedings to hold otherwise. In the words of *Nash, J.*, in reference to the authority of counsel retained in a case: 'By his acts and agreement made in the management of the cause, the plaintiff was bound.' *Greenlee v. McDowell*, 39 N. C., 485. Not less explicit is the language of *Merrimon, J.*, in *Brahn v. Walker*, 92 N. C., 89, where he says of an attorney that, 'as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, *authority to manage and control the conduct of the action* on the part of his client during its progress, and subject to the supervision of the court.' 'As between the client and the opposite party, the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be.' Weeks on Att., sec. 222, and cases cited." We add *Pierce v. Perkins,* 17 N. C., 250. But this is far from saying that he can release a debt or any part of it, or relinquish substantial or important rights, without the consent of his client. An attorney cannot compromise his client's case without special authority to do so (*Moye v. Cogdell,* 69 N. C., 93), and this being so, how can he release it, or any part of it? "A power to collect," says this Court, "does not authorize an assignment or any disposition other than full payment." *Bradford v. Williams,* 91 N. C., 7.

Nor do we think the case of *Kesler v. Linker,* 82 N. C., 456, cited also by counsel, is pertinent to this case. There is no evidence that the plaintiff agreed to look after the security and see that it is applied to the debt. On the contrary, he did not know that the mortgage or lien on the horses had been taken, nor does it appear that the attorney, whether he had authority or not to act in that behalf for his client, made any agreement which bound the plaintiff to active diligence for the preservation of the security. Nor does it appear that the security or any part thereof has been lost or impaired. The horses were seized, sold, and the proceeds applied to the debt. What more could the surety ask to be done?

Our conclusion is that the defendant Lovell, as surety to the note, was not discharged by anything done by the attorney, nor did the latter intend to release him.

No error.

R. D. JOYNER v. J. F. HARRIS.

(Filed 27 November, 1911.)

1. **Register of Deeds — Penalty Statutes—Interpretation—Marriage License—Reasonable Inquiry—Definition.**

The various sections of the Revisal relative to the issuance of a marriage license by the register of deeds, being sections 2083, 2088, 2090, especially the latter two, are construed as being *in pari materia,* and thus considered, the inquiry required to be made before issuing the license is such as to make it appear probable to a prudent person that there is no legal objection to the marriage.

2. **Register of Deeds — Marriage License — Penalty Statutes—Reasonable Inquiry—Verdict Directing—Questions of Law.**

Whether a register of deeds made reasonable inquiry, before issuing a marriage license, within the meaning of our statute, becomes a question of law, on admitted facts, and the court may instruct the jury to answer the issue according as it may decide the law upon the facts to be. Rules adopted by the courts for the purpose of determining whether such inquiry has been made by the register of deeds, discussed by MR. JUSTICE WALKER.

3. **Same—Verdict Directing—Evidence, How Considered.**

Upon issues submitted as to whether a register of deeds made reasonable inquiry before issuing a marriage license, the court's instruction, if the jury believe the evidence they should answer the first issue "Yes" and the second issue "No," and if they did not believe the evidence, to reverse their answers, with the burden of the issues upon the plaintiff, is equivalent to saying there was no evidence which, if believed, entitled the defendant to the verdict, and the evidence will be considered in the light most favorable to him.

4. **Register of Deeds—Marriage License—Reasonable Inquiry—Insufficiency.**

It is not a reasonable inquiry by the register of deeds as to the age of the prospective bride which will relieve him of the penalty of Revisal, sec. 2083, forbidding the issuing of a license for the marriage of a woman under 18 years of age without the consent of the person designated by the statute, for him to rely solely upon the answers of those whom he did not know, but merely trusted because of their manner and appearance, their information as to the age of the woman appearing to depend only upon what she had told them, and when by the exercise of reasonable care and diligence a means of obtaining reliable information could have been made available. *Cole v. Laws*, 104 N. C., 651; *Morrison v. Teague*, 143 N. C., 186, cited and applied.

5. **Register of Deeds—Marriage License—Penalty Statutes—Age of Woman—Substantive Evidence.**

In an action against a register of deeds for the penalty prescribed by Revisal, sec. 2083, for issuing a license for the marriage of a woman under 18 years of age, without the consent of the person designated by the statute, it is held that the testimony of a witness as to the age of the woman depending solely upon her statements to him, which he repeated to the register when the license was applied for, is not substantive evidence of her age.

APPEAL from *Biggs, J.*, at the January Term, 1911, of CABARRUS.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

T. D. Maness for plaintiff.

Montgomery & Crowell and H. S. Williams for defendant.

WALKER, J. This is an action to recover the penalty given by Revisal, sec. 2090, for unlawfully issuing a marriage license to Martin Burrus and Julia B. Joyner, without proper inquiry as to the age of the prospective bride. The statute, under which this suit was brought, is a wise and beneficent one, the object being to protect the parties themselves, and the community as well, from hasty and improvident matrimonial alliances, which eventually produce discord and unhappiness in the family—one of the essential units of our republican household—and are hurtful to society in many ways. Let us examine the case in view of this main purpose of the law.

Martin Burrus and Julia B. Joyner, by themselves, had consented to their marriage; but in order to make it a valid union it is required by the statute that he should be 16 years old and she 14 years old (Revisal, sec. 2083), provided that if they are under the age of 18 years, the consent of the person designated by the statute shall first be obtained; and if a register of deeds knowingly, or without reasonable inquiry, issues a license for the marriage of any two persons, either of whom is under that age, without the written consent required by law to be delivered to him (Revisal, sec. 2088), he forfeits the sum of $200, as a penalty, to any parent, guardian, or other person standing *in loco parentis*, who may sue for the same. It is further provided that the register of deeds shall issue the license if it appears to him probable that there is no legal impediment to the marriage. Revisal, sec. 2088.

It has been held that the several sections, and especially sections 2088 and 2090, being *in pari materia*, should be construed together, and when this is considered, the inquiry required to be made before issuing the license is such as makes it *probable* that there is no legal objection to the marriage. *Bowles v. Cochran*, 93 N. C., 398. With this general definition of a reasonable inquiry established, we find that the following rules have been adopted by this Court for the purpose of determining if such an inquiry or investigation has been made:

1. Where there is a conflict of evidence upon the question, it should be submitted to the jury to decide, under proper instructions from the court, whether due inquiry had been made.

2. Where the facts are admitted or established, what is reasonable inquiry becomes a question of law, and the court may instruct the jury to answer the issue, according as it may decide the law upon the facts to be. *Joiner v. Roberts,* 114 N. C., 389.

3. The statute (Revisal, sec. 2088) does not require that the register shall inquire as to the age of the party by examining the witnesses or the applicant under oath, but merely declares that he may do so, and his doing or not doing so, in the exercise of his discretion, is only a circumstance for the jury to consider in finding whether the proper inquiry has been made.

4. While the court cannot prescribe any exact rule for the guidance of the officer, it would seem that "reasonable inquiry" involves, at least, the idea that it should be made of some person known by him to be a reliable party, or, if unknown to him, information as to his reliability should be obtained from some person who is known by the officer to be reliable.

5. The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. *Furr v. Johnson,* 140 N. C., 157; *Trolinger v. Boroughs,* 133 N. C., 312.

The fourth rule may be somewhat modified in its application by the particular facts and circumstances of the case in hand, what is due inquiry depending largely upon them.

Let us now apply the law, as thus understood, to the facts of this case.

The court instructed the jury, if they believed the evidence, to answer the first issue "Yes" and the second issue "No," and if they did not believe the evidence, to reverse their answers, as the burden of the issues was upon the plaintiff. Under these instructions, the jury returned the following verdict:

1. Was the plaintiff's daughter, Julia Burrus, under 18 years of age at the time of her marriage? Answer: Yes.

2. Did the defendant issue the marriage license without plaintiff's consent and without reasonable inquiry? Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $200.

The charge of the judge was equivalent to saying that there was no evidence which, if believed, entitled the defendant to the verdict; and this being so, we must view the evidence in the light most favorable to him. We will, therefore, take his version of the facts, which in substance is as follows:

Martin Burrus, the prospective groom, went to the register's office with his brother, Adam Burrus, and applied for the license. They were well dressed and defendant says he thought they were trustworthy and would not get him in trouble. He asked them if they were related to J. A. Harris, whom defendant knew very well, and one of them replied that he was his uncle. He inquired of Martin Burrus his age, and was told that he was 21 years old, and lived in No. 9 Township with his father. He then stated the ages of his father and mother. Defendant then asked him as to the age of the young lady, and he answered that "She said she was 18." Defendant told him "that would not do; that is not the question," but "is she 18, and will you swear it?" to which he replied that he would, and thereupon the license was issued, and defendant testified that, if he had not made that statement, he would not have issued the license. Martin Burrus also gave the names of her father and mother and their place of residence, and further stated that they all lived on Tom Bost's farm, within 300 or 400 yards of each other. When he was asked to qualify as to the girl's age, he replied, "She said she was 18," but when he was again told that his answer would not do, he swore that she was 18. Defendant knew the plaintiff, but did not know, at the time, that she was his daughter. He did not ask if there was any objection to the marriage. The two men answered the defendant's questions openly and frankly, and there was nothing in their manner or conduct to arouse suspicion. He knew there was a telephone to Bost's mill, where the girl's parents lived, but he did not use it. He had never seen the two young men before and did not know anything about them up to that time, and issued the license solely upon their statement, they not being identified or vouched for by any one. There was no further inquiry by the defendant about the matter.

The plaintiff's evidence varied a little from the defendant's, it appearing therefrom that the questions were addressed to the brother of the applicant, Adam Burrus, and the answers thereto given by him; but this makes little or no practical difference in the result. Plaintiff testified that defendant afterwards told him that he regretted the occurrence, and asked him not to think hard of him, and that "Nobody else would get him in a hole like that again." The plaintiff's witness, Adam Burrus, differed with the defendant as to what he or his brother had said as to the age of the girl, he stating that they did not say that she was 18, but that "she had said so to him" and he had no reason to doubt her word. In this respect, defendant was corroborated by his witness, W. M. Weddington, who stated that the one who answered the questions, signed the oath as to her age. The plaintiff testified that his daughter was a little over 14 years old at the time of the application for the license, and there was no evidence to the contrary as to her age.

We do not think, upon this statement of the facts which is most favorable to the defendant, that he made the requisite inquiry. The two young men were entirely unknown to him, and it is perfectly apparent that they were either ignorant of the girl's age or were attempting to suppress the truth as to it. The defendant had no reason to rely upon them as men of good character and as being trustworthy, for he knew absolutely nothing about them, and, besides, it should have been evident to him, or to any prudent man under the same circumstances, that they were basing their opinion as to her age upon her own statement, and not upon their own knowledge. He could easily have obtained reliable information by the use of the phone, or by requiring them to produce some person known to him, who would identify them as being the persons they had represented themselves to be, and who would testify as to their good character. This case is not, in its main features, unlike *Cole v. Laws*, 104 N. C., 651, the syllabus of which fairly states the facts and the ruling, and is as follows: "When a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information: *Held,* that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect." And likewise, in *Morrison v. Teague,* 143 N. C., 186, it was held that, "In an action against a register of deeds to recover the penalty under Revisal, sec. 2090, for issuing the marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction that, as a matter of law, defendant failed to make reasonable inquiry as to the age of the plaintiff's daughter." To the same effect are the following cases: *Williams v. Hodges,* 101 N. C., 300; *Trolinger v. Boroughs, supra; Laney v. Mackey,* 144 N. C., 630. If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would, by reason of their youthful impulses, be liable to enter into so solemn and serious a relation lightly or unadvisedly, and not soberly, discreetly, and reverently, as they should do and as the best interests of society require should be done.

It was suggested that the defendant had just taken office, and intended no wrong. We do not doubt it, and it is a matter which might, perhaps, induce the plaintiff to relent in his prosecution, and constitutes a strong appeal to his generosity; but the law must be upheld, and ignorance of it is no excuse. The best way to compel obedience to it is by its strict enforcement. This will make the citizen and the officer more careful to observe it. We sympathize with the defendant, under the circumstances, but cannot help him. He has violated the law and, if the plaintiff exacts it, as did Shylock, the Jew, of his victim, must pay the penalty.

There is no force in the contention that the witness Adam Burrus testified to the age of the girl, as given by her to him. He was manifestly merely repeating to the court what occurred before the register of deeds, and did not intend to state, independently and substantively, that she had told him her age. It was, therefore, no evidence for the defendant, upon the first issue, conceding that it would have been had he so testified.

No error.

MERCHANTS NATIONAL BANK v. DUNN OIL MILL COMPANY.

(Filed 13 December, 1912.)

Corporations—Bills and Notes—President—Authority—Ultra Vires—Consideration.

A bank desiring to borrow money from its correspondent bank hypothecated as collateral to its own note a note obtained from the president of a local oil mill corporation, signed with the name of the corporation by the president, without any consideration moving to the oil company being shown. The local bank being insolvent, the correspondent bank, as an innocent purchaser for value, sued the oil company on the collateral note, and the defense was the failure of consideration and lack of authority of the president to give the corporation's note. A motion to nonsuit was improperly sustained.

BROWN, J., did not sit and took no part in the decision; WALKER, J., concurred in the opinion of CLARK, C. J.; HOKE, J., dissented.

APPEAL from *Peebles, J.*, at April Term, 1911, of NEW HANOVER.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

E. K. Bryan and Rountree & Carr for plaintiff.
J. C. Clifford and N. A. Townsend for defendant.

CLARK, C. J. The Merchants and Farmers Bank of Dunn executed its note to the plaintiff bank for $10,000 borrowed money, and deposited as collateral security a note which had been executed to it for $10,000, signed "Dunn Oil Mills Company, by J. D. Barnes, President." This note was indorsed to the plaintiff before maturity by the Merchants and Farmers Bank of Dunn "by E. F. Young, President." The said Merchants and Farmers Bank of Dunn failed, and this action was brought against the said oil mills on its said note. The defendant oil mills pleads that it received no consideration for the same and that its president, J. D. Barnes, was not authorized to sign said note.

The defendant relied upon a provision in its by-laws: "All other contracts shall be in writing and signed by the president, or vice president, secretary and treasurer." The "secretary and treasurer" was one office. A fair construction of the by-law is that the writing should be signed by the president or vice president or secretary and treasurer. This note was signed by J. D. Barnes, president. His Honor erred, therefore, in his intimation that the note in question was not binding upon the Oil Mills Company.

But upon the broader question which was argued before us, whether, if the by-law meant to require the secretary and treasurer *and* the president to sign all contracts, the company would be bound by a note signed by its president, in the absence of proof that the plaintiff had notice of such by-law, we are of opinion that the Oil Mills Company is bound by the promissory note which was issued in ordinary course of dealing and signed by its president. Nothing is more common than for mercantile and negotiable paper to be signed by the president *or* secretary and treasurer of a corporation.

The well-settled rule of law is that where one of two innocent parties must suffer by the act of another, that one which has put it in the power of the wrongdoer to commit the act must bear the loss. *R. R. v. Barnes,* 104 N. C., 25. The Oil Mills Company elected J. D. Barnes its president and thus put it in his power, according to the usual custom, to sign notes. If he abused his trust, the loss must fall upon the company which selected him and put him in that situation. For its own protection the company passed the above by-law. If it intended thereby to prescribe that its note should be signed by the secretary and treasurer as well as by its president or vice president, it was competent for it to make such regulation. But such regulation would not affect the plaintiff bank, which took the note for value and before maturity, without notice of such regulation and relying upon the usual custom that mercantile paper can be signed by the president or general manager of a corporation.

In *Davis v. Insurance Co.,* 134 N. C., 60, this Court said that the president was "the general representative of the company," and in *Grabbs v. Insurance Co.,* 125 N. C., 389, it said that the expression "general agent" implied general powers. It has also been held that a general agent can make contracts for the company. *Grabbs v. Insurance Co., supra; Gwaltney v. Assurance Society,* 132 N. C., 925; *Davis v. Insurance Co., supra.*

It is no defense against a holder for value without notice that the officer exceeded his authority. 7 Cyc., 625.

"Where a party deals with the corporation in good faith, the transaction is not *ultra vires,* and if he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity the corporation is bound by the contract, although such defect or irregularity in the authority exists." *Bank v. Bank,* 10 Wallace, 644.

"The *bona fide* holder for value of notes taken before maturity can recover against the corporation notwithstanding any want of authority of the agent to execute these notes for the purpose for which they were given." *Bird v. Daggert,* 97 Mass., 494.

The general rule that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation. In such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent. The promissory note of this corporation was not *ultra vires.* There is no prohibition in the law against such a corporation issuing its promissory negotiable note.

In *Hutchins v. Bank,* 128 N. C., 72, the Court held that a contract of guarantee by a bank cannot be avoided on the ground of *ultra vires,* and held that even where a contract is *ultra vires* the corporation will be bound if the contract was within the general scope of its powers and has been wholly or partially executed. In that case this Court said, citing *Bank v. Bank,* 101 U. S., 183: "It is to be presumed that the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

The president of a corporation has an implied power to indorse and transfer its negotiable paper. Indeed, in the case of National banks the president is authorized by statute to indorse the paper of the bank. Daniel Neg. Inst., sec. 394.

Unlike mining companies, as to which cases have been cited, and who buy very little except machinery, oil mills need considerable quantities of money for the purchase of cotton seed from time to time. Indeed, they have need to issue negotiable bills far more than banks, cotton factories, and railroads. It is a matter of common knowledge that they obtain this money by issuing promissory notes, usually to the banks, as in this case. Besides, the charter of the defendant authorizes it to buy cotton and cotton seed, to gin cotton, to manufacture cotton-seed oil, cotton-seed meal, to buy and sell cattle, hogs, and other stock, to manufacture ice, to buy and sell real estate and personal property, and, in addition, specifically authorizes the defendant "to borrow money in such amounts and at such times to carry on the business of this corporation as the proper officer may deem proper." There is also authority to manufacture, buy and sell fertilizers. These things certainly authorized the making of negotiable paper in the course of its business.

Though the defendant here pleaded that it received no consideration for this paper, this was not shown in evidence. The note sued on was strictly commercial and negotiable in form under our statute; the plaintiff, a bank in a distant town, is a purchaser for value in due course; the note was put in circulation through the agency of a bank in the town where the oil mills were located and with which the oil mills had dealings; it was put in circulation and signed by the oil mills through its chief officer. The purchaser in such case in due course, knowing the course of dealings by oil mills in getting money from the banks, was not required to hunt up and read the by-laws of the oil mills before purchasing, especially since reference to the charter would have shown that the making of negotiable paper and the borrowing of money was within the scope of the powers of the defendant.

The true doctrine is stated in *Bank v. Bank,* 10 Wallace, 64: "That such acts of an officer of a corporation as are usually performed by that officer are valid as against the corporation in favor of innocent parties, although the act in the particular instance was beyond the authority of the officer." Banks do not usually issue promissory notes or borrow money, yet they are bound by the act of their cashiers in certifying checks falsely.

The plaintiff bank in Wilmington in taking this paper, indorsed by the Bank of Dunn, with which the oil mills at Dunn were in the habit of doing business, was not guilty of negligence in assuming that the paper was signed by the proper officer of the oil mills and was issued in the course of its ordinary dealings with its regular bank. There is nothing in this evidence to show that the oil mills did not obtain full value. At any rate, it was the act of the oil mills, acting through its chief officer, that the paper was put in circulation and the plaintiff bank took it in due course, for value and without notice, and as such is protected by the statute.

Our conclusion is that the president of the corporation being its general agent, the promissory note executed by him in its name was *prima facie* valid, and being indorsed to the plaintiff before maturity for value and without notice, the corporation is bound by the act of its president, unless it were shown that the plaintiff had notice of a restriction upon the powers of the president as such general agent.

In *Watson v. Manufacturing Co.,* 147 N. C., 475, this Court quoted with approval the following language from Thompson on Corporations, 8556: "A stranger dealing with the corporation is not affected by secret restrictions upon the powers of a general manager of which he has no notice. In short, the powers of one who has been appointed general manager of the business of the corporation are, in America, generally understood to be coextensive with the general scope of its business. . . . A person dealing with the corporation through him may safely act on the assumption of his possessing the power in the absence of anything indicating a want of it."

In *Mershon v. Morris,* 148 N. C., 52, this Court approves the following language from Judge Thompson, 10 Cyc., 1003: "Excluding the operation of express statutes, a very extensive principle of the law of corporations, applicable to every kind of written contract executed ostensibly by a corporation, and to every kind of act done by its officers and agents professedly in its behalf, is that, when the officer or agent is the appropriate officer or agent to execute a contract or do an act of a particular kind in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation: always provided that the corporation itself had the power under its charter or governing statute to execute the contract or to do the act."

The Oil Mills Company had authority to execute promissory notes. The president was *ex vi termini* its general agent. The plaintiff having taken a promissory note executed by the president of said oil mills, in regular course, before maturity, for value and without notice of any restriction upon the authority of the president to execute said note, the court below erred in holding that said note was not binding upon said Oil Mills Company. Any other ruling would materially affect dealings in negotiable paper executed by a corporation.

Error.

WALKER, J., concurs in opinion of CLARK, C. J.

ALLEN, J., concurring: I concur in the order directing a new trial. The question involved in this case is of the first importance, involving as it does, on the one hand, the integrity of paper claimed to be negotiable, and, on the other, the power of the industrial corporation in its by-laws to restrict the authority of its officer to issue paper, and I think it ought not to be decided until the facts are fully developed.

It is material to inquire whether the defendant received any benefit from the paper in controversy in money, the payment of debts, or as a credit, and whether its president habitually transacted business of this character.

The opinion of the *Chief Justice* proceeds largely upon the assumption that these facts do appear, but I do not think so.

HOKE, J., dissenting: I am unable to concur in the view which has prevailed with the Court in this case, and believing that the decision, in so far as indicated and controlled by the principal opinion, is subversive of established principles and well calculated to have far-reaching and injurious effect on the business interests of the State and its people, I consider it proper to make some statement of the reasons for my position. The portion of the by-laws of the defendant, the Dunn Oil Mills, relative to the president's duties and his power to make contracts for the company are as follows:

"ARTICLE 1. The president, with the approval of the secretary and treasurer, shall be empowered to employ a bookkeeper, at a salary to be fixed by the directors.

"ARTICLE 2. The president shall preside at all meetings and shall make annual report to the stockholders' meeting and shall attend to all other duties hereinafter imposed upon him by these by-laws.

"ARTICLE 3. The secretary and treasurer shall be elected by the directors for a term to be fixed by them. He shall at each semiannual meeting of the directors render an account current, showing the assets and liabilities of the company, and shall present his books and vouchers, showing receipts and disbursements of the corporation. He shall enter into a good bond of $25,000 in an acceptable guaranty company, for which the premiums shall be paid by this company.

"ARTICLE 4. The president, secretary and treasurer shall have the power to employ a superintendent, salary to be fixed by them, subject to the approval of the board of directors. All purchases incident to the operation of the work shall be made by the secretary and treasurer, but no purchase shall be made by him without the approval of the president. All other contracts shall be in writing and signed by the president or vice president, secretary and treasurer."

In my opinion, these by-laws by correct interpretation clearly require that in order to bind the corporation by a contract of this character, it must be executed by the president or vice president and the secretary and treasurer, who, it will be noted, is the responsible officer of the company, acting under a heavy bond for the proper performance of official duty.

The president of the Dunn Oil Mill, then, had no authority to make the corporation's note, and the instrument sued on can only be enforced as an obligation of the company on the ground that the execution of the instrument is within the apparent scope of the president's power, or that the corporation had by its negligent conduct put him in a position that enabled him to perpetrate a fraud, and on the facts as they appear of record neither position can be correctly maintained. From these facts it appears that on 7 November, 1902, the president of the Dunn Bank, being in Wilmington, applied to the plaintiff bank for a loan of $10,000. The loan was made on the note of the Dunn Bank and with the understanding that collateral should be forwarded to secure the same. Later, on 11 December, 1902, the president of the Dunn Bank wrote inclosing collateral, among others the note sued on, purporting to be executed by the president alone, one J. D. Barnes. That the oil mill is a local industrial corporation engaged in the business indicated by its title, having a paid-up capital of $22,700. There are no facts in evidence tending to show that the president of the oil mill was accustomed to sign notes for the company or that he had ever signed one for any purpose except the note sued on, or that any such custom existed in corporations of this character, or that the company had ever acquiesced in or in any way ratified this or any other transaction of like kind. Nor is there testimony that the note was given for machinery or cotton seed or other material usual or necessary in the construction or operation of the plant. Nor is there any evidence tending to show that the oil mill needed this money or that it has ever received a dollar of it nor any benefit from it. The only evidence even offered on that subject was a statement in a letter of the president of the Dunn Bank to plaintiff, tending to show it was for the benefit of the mills, a declaration not made or sanctioned by the oil mill or its officers, and therefore excluded by the court. On these the controlling facts relevant to the inquiry, a decision based on the proposition that the president of this oil mill, an industrial enterprise, having a paid-up capital of only $22,700, may without authority and in contravention of its by-laws put in circulation a note for $10,000 binding as a negotiable instrument, is not grounded on right reason nor is it sustained by any well-considered authority. Even in the case of banks and officers charged officially with the duties of carrying on its ordinary business, the power to borrow money has been held not within the scope of their authority, real or apparent. *Bank v. Armstrong,* 152 U. S., 346; *Bank v. Bank,* 2 N. J., p. 257.

In the United States decision it was held: "The borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank has special authority." And in the case of ordinary industrial corporations the decided cases and text-books of approved excellence are against the position of the Court on the facts as presented in the record. *Craft v. R. R.,* 160 Mass., 267; *R. R. v. Bank,* 62 Ark., 33; *Worthington v. R. R.,* 195 Pa. St., 211; *Edwards v. Carson Water Co.,* 21 Nev., 469; *Gould v. Gould,* 134 Mich., 565; *N. Y. Iron Mine v. Bank,* 39 Mich., 644; *Elwell v. R. R.,* 7 Washington, 487; *Bocark Ex. v. Coal and Iron Co.,* 82 Va., 913; *Bank v. Roman Catholic Church,* 109 N. Y., 512; Cook on Corporations (6 Ed.), secs. 716-719; Clark on Corporations, p. 495; 21 A. and E., p. 859.

To quote from a few of the cases: In *Iron Mine v. Bank, supra, Cooley, J.,* said: "*It was not disputed* by the defense that the corporation as such had power to make the notes in suit. The question was whether it had in any manner delegated that power to Wetmore. We cannot agree with the plaintiff that the mere appointment of general agent confers any such power. *White v. Westport Cotton Mfg. Co.,* 1 Pick., 215, is not an authority for that position, nor is any other case to which our attention has been invited. In *McCullough v. Moss,* 5 Denio, 567, the subject received careful attention, and it was held that the president and secretary of a mining company, without being authorized by the board of directors to do so, could not bind the corporation by a note made in its name. *Murray v. East India Co.,* 5 B. and Ald., 204; *Benedict v. Lansing,* 5 Denio, 283, and *The Floyd Acceptances*, 7 Wall., 666, are authorities in support of the same view. The plaintiff, then, cannot rest its case on the implied authority of the general agent; the issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse to the injury and, indeed, to the utter destruction of a corporation, that it is wisely left by the law to be conferred or not as the prudence of the board of direction may determine."

In *Worthington's case, supra*, 195 Pa. St., it was held: "The by-laws of a corporation, upon their adoption, become written into the charter, and put parties, who deal with the corporation, upon notice, in trading with the officers of the corporation, as to the extent of the power and agency of such officer, and this, whether the specific by-law has been brought home to them or not."

"In an action against a corporation to hold it liable on an indorsement of a promissory note by its president, binding instructions should be given for defendant where it appears that the president had no authority under the by-laws to make the indorsement, that the corporation received no benefit from it, and that there was no course of dealing between the parties which misled the plaintiff."

In the Arkansas case the Court held, among other things: "(*a*) The president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper unless such authority is expressly conferred. Such power is not to be presumed simply from the fact that it has been exercised. (*b*) A corporation is liable on negotiable paper issued by its president and secretary only when express power has been conferred upon them to issue it or when they have habitually issued it or when their act in issuing it has been valified by the corporation or when the latter has received the benefit by the transaction."

In Cook, sec. 717, the doctrine is stated as follows: "The president of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management. His duty is merely to preside at meetings of the board of directors, and to perform only such other duties as the by-laws or resolutions of the board of directors may expressly authorize. This is a rule established by the great weight of authority. The board of directors may of course expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director. This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below."

And even when the president acts as general manager, this same author says, section 719: "The general manager of a corporation has no power to make and deliver the promissory note of the company nor to indorse the name of the company on commercial paper, except possibly in payment of debts," etc.

In no jurisdiction has the wholesome doctrine contended for been more clearly stated nor more fully fortified and sustained than with us, as evidenced in the case of *Bank v. Hay*, 143 N. C., 326. In that valuable opinion, *Associate Justice Walker* in apt and forceful language and with a wealth of authority sustains the propositions: "When one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal. The authority to draw, accept, or indorse bills, notes, and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business, that is, if the purpose of the agency cannot otherwise be accomplished."

It is no answer to this position to say "That when one of two innocent parties must suffer by the act of another, that one which has put it in the power of the wrongdoer to commit the act must bear the loss." This is to avoid the issue by begging the entire question. The very question involved here is whether the corporation has acted wrongfully, and whether by reason of the wrong the instrument sued on has become its obligation.

What has it done or neglected to do? It has elected a president and conferred upon him power to preside over the meetings, make annual reports, and, in conjunction with the secretary and treasurer, a bonded officer to the extent of $25,000, to make the valid and ordinary contracts incident to the business.

Under the law, the signing of commercial paper is not within the scope of his authority, real or apparent. The company has done nothing to recognize or ratify his conduct on this or any other occasion, nor has it received any benefit from his act. In such case it would not do to say that the mere electing him president put him in a position to wrong others. Speaking to this very question, in *Iron Mine v. Bank,* 39 Mich, *Judge Cooley* says: "While the principle invoked is a very just and proper one, it is one that must be applied with great circumspection and caution. Any person may be said to put another in position to commit a fraud when he confers upon him any authority which is susceptible of abuse to the detriment of others; but if the authority is one with which it is proper for one man to clothe another, negligence cannot be imputed to the mere act of giving it. Any one who entrusts to another his signature to a written instrument furnishes him with the means of perpetrating a fraud by an unauthorized alteration or other improper use of it. But if the instrument was a proper and customary instrument of business, and has been issued without fraudulent intent in a business transaction, there is no more reason for imposing upon the maker the consequences of a fraudulent use of it than there is for visiting them upon any third person. In other words, it is not the mere fact that one has been the means of enabling another to commit a fraud that shall make him justly chargeable with the other's misconduct; but there must be that in what he has done or abstained from doing that may fairly be held to charge him with neglect of duty."

The position of the Court is not strengthened by the fact that this corporation is given, in express terms, the right to borrow money. Very few, if any, industrial companies are without such power. Nor by assuming, entirely without supporting evidence, in the record or out of it, so far as the writer is aware, that an oil mill is more accustomed to borrow money than any and every other kind of industrial corporation engaged in business; nor by the proposition advanced that this was commercial paper, put in circulation by the oil company and its agencies. It does not appear that the corporation has borrowed any money or that it has received any pecuniary benefit from the transaction, and the fundamental question is whether the note sued on was put in circulation through the oil company or its agencies, whether the paper in any way ever became the company's note; and here, also, to my mind, the Court assumes the very point in dispute. The cases cited and relied upon by the Court do not, in my view, support its position. In the insurance cases cited from this Court, *Davis v. Insurance Co.* and others, the decision proceeded on the theory that the officer was a general agent, representing the company, and the act in question was within the scope of his powers. In *Bank v. Bank*, 77 U. S. (10 Wall.), 604, the acts of a bank cashier, in pledging the bank's credit by certifying checks, were shown to be according to a custom generally prevalent with banks, and it was held that there was evidence from which it might be inferred that the custom prevailed at this particular bank and with its knowledge and assent. In *Oliver v. Bird*, 97 Mass., the agent was duly authorized to sign "all notes and business papers," and this was construed as justifying the position that an accommodation note was within the scope of his apparent authority. *Hutchins v. Bank*, 128 N. C., 72, the question was on the power of a banking corporation to act in the premises, and the authority of the officers to charge it or the methods by which they could do it was in no way presented. And the reference to Thompson on Corporations, secs. 85, 5-6, and 10 Cyc., 1003, as cited with approval in *Watson v. Manufacturing Co.*, 147 N. C., 475, and *Merchon v. Morris*, 148 N. C., 52, were on facts widely variant from these appearing in this record. In *Watson's case* the officer executing the note in question was president and treasurer as well as owner of nearly all the stock, was in absolute control of the corporation, its assets and purposes, and, further, there was ample evidence of ratification. *Africa v. Duluth Co.*, 82 Minn., 283, on similar facts, was to like purport. In

Merchon's case the president of a lumber company had given an order for a lot of machinery for use in the company's business, which was delivered under a contract that title should remain in the vendor till the purchase price was paid. The company having become insolvent, vendor claimed a lien under the contract, and the court very properly held that the company or the receiver having control of its assets could not keep the machinery and repudiate the obligation. But as far as I am able to interpret them, no authoritative decisions can be found that will uphold this note as a valid obligation of the defendant company on the facts of this case. There is nothing harsh or unreasonable in the position contended for. No well-ordered bank should place $10,000 with a company of this character or any other, without looking to the authority for the transaction. No well-ordered bank does do it, or, if they do, they should not be protected in it. It was very little to ask on the part of these injured stockholders that a bank within sixty miles of the company's placing should inform themselves on this vital question. A vast and increasing amount of business in this country is being undertaken and carried on through these smaller incorporated companies. They are contributing much to the business enterprise and welfare of every section of the State and afford one of the few opportunities remaining for small investors. A decision which ignores and breaks down the safeguards reasonably devised for their protection, affording opportunity for a faithless, inefficient, or gullible president to wreck his company and destroy its assets under the persuasive influence of some local bank president, sometimes a friend and always in a position to extend personal favors, is to be indeed deplored, and in my judgment has no sanction in good reason nor well-considered precedent.

I am of opinion that the order of nonsuit should be affirmed.

STATE EX REL. MORGANTON GRADED SCHOOL ET AL. v. C. MANLY McDOWELL.

(Filed 13 December, 1911.)

1. **Sheriffs—Collection of Taxes—Balance Due—Counterclaim.**
In an action to recover from a sheriff a balance of taxes collected by him and due, a counterclaim or debt of any kind, however valid, cannot be sustained.

2. **Same—Mandamus—Procedure.**
A graded school and county commissioners sued the sheriff for taxes collected which should have been paid the school, and the defendant set up a counterclaim that for certain previous years the county commissioners had wrongfully appointed another to collect these taxes, and that the commissions thus due him should be deducted from plaintiff's claim: *Held*, (1) the sheriff's remedy was by mandamus against the county commissioners at the time alleged, to have the tax books placed in his hands by the county commissioners, and an injunction to prevent the payment of the commissions to the collector alleged wrongfully to have been appointed, until his right had been decided; (2) or by suit against the collector alleged to have been wrongfully appointed, for the commissions paid to him.

3. **Sheriffs—Commissions on Taxes—Speedy Trial—Procedure.**
The right to a speedy trial by a sheriff suing for commissions on taxes collected by one wrongfully appointed by the board of county commissioners is secured under Revisal, 833; and his interests are protected by the undertaking required by Revisal, 835.

4. **Same—Trusts and Trustees—Bar to Action.**
The taxpayers are not required to pay commissions twice for the collection of taxes because the wrong party discharges the duties of collector, the remedy of the one wrongfully deprived being against the intruder who has thus deprived him of his commissions, in an action for money had and received to his use (Revisal, 844), and his failure to do so in his action to recover the office is a bar to an independent action therefor.

5. **County Commissioners—Sheriff's Commissions—Official Capacity—Counterclaim—Cross-actions—New Matter.**
A sheriff in his answer to an action by a graded school and the county commissioners for balance of taxes collected by him, due and not paid over, may not set up a counterclaim for commissions on taxes for previous years collected by one wrongfully

appointed for the purpose by the county commissioners, for this is a cross-action against the plaintiffs for their alleged wrongful act as county commissioners in their official capacity, which he could not maintain if brought directly.

APPEAL from *Long, J.*, at October Term, 1911, of BURKE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

S. J. Ervin for plaintiff.
Avery & Avery for defendant.

CLARK, C. J. This was an action against defendant, the former sheriff of Burke, upon his official bond to recover a balance due for taxes collected by him for the Morganton graded school for 1905 and 1906 under Laws 1903, ch. 455. The defendant set up as a counterclaim that he was illegally and wrongfully deprived by the board of county commissioners of the right to collect taxes for said graded school for the years of 1903 and 1904, the county commissioners having appointed John B. Holloway and F. C. Berry to collect the taxes for the said graded school for said years 1903 and 1904, and had allowed them the commission for collecting the same, amounting to $295, which sum he asked that he be allowed "as a set-off and counterclaim" on the taxes due by him for the years 1905 and 1906.

Such counterclaim cannot be sustained, for three reasons:

1. As against the balance due by the defendant as sheriff for taxes in his hands collected for the years 1905 and 1906, no counterclaim or debt of any kind, however valid, can be sustained. This has been so fully discussed that it is only necessary to cite a few of the cases: *Wilmington v. Bryan,* 141 N. C., 679; *Guilford v. Georgia Co.,* 112 N. C., 37; *Gatling v. Commissioners,* 92 N. C., 536; *Cobb v. Elizabeth City,* 75 N. C., 1; *Battle v. Thompson,* 65 N. C., 406. In *Wilmington v. Bryan,* 141 N. C., 675, *Brown, J.,* says: "No counterclaim is valid against a demand for taxes," citing *Gatling v. Commissioners, supra.* In same case *Walker, J.,* in his dissenting opinion (as to other points), concurs as to this proposition, and says: "Neither a taxpayer nor a sheriff can plead a set-off in a suit

against him for taxes due and owing. . . . This is so upon the ground of public policy. To permit a taxpayer or an officer charged with the collection of taxes to set up an opposing claim against the State or the city might seriously embarrass the Government in its financial operations by delaying the collection of taxes to pay current expenses," citing the cases above quoted.

2. The defendant is not entitled to be allowed the counterclaim for the further reason that if he was wrongfully deprived of the right to collect the graded-school taxes for 1903-4, it was his duty to have taken proper proceedings for a mandamus to have the tax list placed in his hands by the county commissioners and have asked for an injunction to prevent the payment of commissions thereon to Holloway and Berry until his right to the same had been decided. If he did not choose this remedy, his recourse was to sue Holloway and Berry for the commissions which he alleges has been wrongfully paid to them. Revisal, 833, expedites the trial of actions of this nature by giving them precedence over all other actions, civil and criminal, and by requiring trial at the return term of the summons if thirty days off, and Revisal, 835, requires the defendant before answering or demurring to file an undertaking in an amount to be fixed by the judge, not less than $200, to secure the fees and emoluments if the plaintiff shall recover the office.

In this case the defendant sheriff did not bring such action, but asserts his right to the fees for duty which was performed not by himself, but by Holloway and Berry, without legal objection by him, and this after having slept on his rights for four years. The taxpayers are never required to pay two salaries, or two sets of commissions, because the wrong party discharges the duties of an office. Any other rule would be open to grave abuse and has never been recognized in a single instance in this State. Indeed, Revisal, 844, provides that the claimant of an office should recover compensation in damages for the loss of the fees and emoluments of the office from the intruder who had received the same, in an action for money had and received to the relator's use (*McCall v. Webb,* 135 N. C., 361), and his failure to do so in the action to recover the office is a bar to an independent action.

3. The defendant in setting up this "new matter and by way of counterclaim," as he says in his answer, is in effect bringing a cross-action against the plaintiffs for their wrongful act, as county commissioners in their official capacity, which he could not maintain if brought directly, and therefore he cannot bring it by way of counterclaim. *Hull v. Roxboro,* 142 N. C., 455; *Fisher v. New Bern,* 140 N. C., 510; *Barger v. Hickory,* 130 N. C., 550; *Jones v. Commissioners, ib.,* 451; *Pritchard v. Commissioners,* 126 N. C., 912; *Moffitt v. Asheville,* 103 N. C., 237; *Hannon v. Grizzard,* 99 N. C., 161; *Manuel v. Commissioners,* 98 N. C., 9; *White v. Commissioners,* 90 N. C., 439.

If, as was pointed out by *Pearson, C. J.,* in *Battle v. Thompson,* 65 N. C., 406 (quoted by *Walker, J.,* in *Wilmington v. Bryan,* 141 N. C., 680), the defendant had actually collected the taxes for the graded school for 1903-4, and was being sued for the balance of the uncollected taxes for those years, it may be that his claim for such commissions might "be allowed in diminution of the amount to be recovered . . . but it would be on the ground that the claim was in the nature of a payment or a credit, to which the defendant is entitled, and the demand of the State is in fact only for the balance." But here this is a counterclaim, and is properly so styled in the defendant's answer, for it is not a claim for commissions on the taxes collected by the defendant for the years 1905 and 1906, nor indeed is it a claim for services actually rendered, but is for commissions which he claims the county owes him constructively because the county commissioners wrongfully placed the collection of the tax list for the graded schools for the years 1903-4 in the hands of another.

The court below erred in overruling the exceptions of the plaintiffs for the allowance of said $295 in reduction of the balance due by the defendant, and the judgment must be reformed accordingly. This renders it unnecessary to consider the plaintiffs' exceptions for overruling the plea of the statute of limitations and the other exceptions made by them.

Reversed.

T. C. McBRAYER v. FRANKLIN BLANTON ET ALS.

(Filed 13 December, 1911.)

1. **Deeds and Conveyances—Chain of Title—Estoppel by Deed.**
   A deed in defendant's chain of title introduced for the purpose of estoppel in an action involving title, cannot have that effect if defendant has failed to connect plaintiff's chain of title with it.

2. **Deeds and Conveyances—Chain of Title—Locus in Quo—Identification—Burden of Proof.**
   In an action involving title to disputed lands it is for the party relying upon a deed in his chain of title to establish that it covered the *locus in quo*, and the failure of the trial judge to so charge in proper instances constitutes reversible error.

3. **Deeds and Conveyances — Executors and Administrators — Authority—Ancient Deeds—Recitals.**
   An ancient deed by an administrator to be sufficient within itself should contain recitals to show the authority of the administrator to make it.

Appeal from *Long, J.*, at February Term, 1911, of Rutherford.

Civil action to recover a tract of land. These issues were submitted to the jury:

1. Is the plaintiff the owner in fee and entitled to the possession of the land described in the complaint? Answer: No.

2. Are the defendants, or any of them, in possession of the land described in the complaint, or any part of it? Answer: Yes.

3. What damages, if any, is plaintiff entitled to recover of the defendants? Answer: ....

From the judgment rendered the plaintiff appealed.

Tillett & Guthrie and Robert S. Eaves for plaintiff.
McBrayer, McBrayer & McRorie for defendants.

Brown, J. In order to show title out of the State plaintiff introduced grant to Thomas Whitesides dated 28 November, 1792, admitted to cover the land in controversy. Plaintiff then introduced:

1. Allotment to Sarah Gettys in partition proceedings of Alpha Sweezy estate, covering the land in controversy.

2. Deed of Sarah Gettys and husband, Smith Gettys, to Augustus Surratt for same.

3. Deed of Surratt to plaintiff for said land.

4. Evidence showing adverse possession in Surratt for more than fifteen years prior to 1904 and up to that year.

Present possession by defendant was admitted.

The defendants introduced (1) deed Franklin Whitesides, administrator of Thomas Whitesides, to James Chitwood, dated 19 April, 1796; (2) deed James Chitwood to Jesse Chitwood; (3) will of Jesse Chitwood, dated 8 January, 1856, devising the land to Sarah Blanton, subject to life estate of Sarah Chitwood; (4) deed from James Chitwood to Elijah Sweezy, dated 16 August, 1824, offered for purpose of estoppel.

We find nothing in the record connecting plaintiff with Elijah Sweezy, or tending to prove that plaintiff claimed the land under him or that his deed covers the land in controversy. Therefore the attempt to connect plaintiff with James Chitwood and to show that plaintiff claims under him has failed.

The plaintiffs contend that the deed introduced by the defendant from James Chitwood to Jesse Chitwood is void for insufficient description and cannot be located. The description is as follows:

"Also a part of another tract of land containing 300 acres, granted to Thomas Whitesides and by him conveyed to the said James Chitwood and by him now conveyed to Jesse Chitwood, beginning at a post oak, corner of said tract; thence the line running east 187 poles to a black oak; thence south a certain distance to a black oak in the middle of the road; thence with said road a certain distance to a stake in Morrell's west line; thence with said line north the line of the 300 acres survey; thence with said line a certain distance to a stake; thence a conditional line northwest to a tree on the south side of the branch to range with one on the north side of the said branch; thence N. 70 E., to the beginning, containing 100 acres, be the same more or less."

In reference to the location of this deed, the surveyor testified: "I do not think the deed could be surveyed. The first call, if you begin at the post oak on the northern line of the grant, would have to be shortened from 187 to 157 poles; this would put you at the corner at the end of this line. The next call could not be run, nor the next. What I say with reference to the location of the boundaries of this deed is simply my opinion as a surveyor, and is not based on any effort to run the deed or to locate the corners called for in it."

The burden of proof was on the defendant to locate this deed, as it constituted a link in defendant's chain of title, and to establish that it covered the *locus in quo,* and his Honor should have so instructed the jury. *Bailey's Onus Probandi,* 113; *Collins v. Swanson,* 121 N. C., 67.

As this case is to be tried again, we will not discuss the deed from William Franklin Whitesides, administrator of Thomas Whitesides. It is an essential part of the defendant's claim of title, and we note that the description of the land is full, but there is no evidence of any authority upon the part of the administrator to sell the land and no recitals whatever in the deed which would in an ancient deed be evidence of such authority.

New trial.

GUS HAMMETT v. SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1911.)

Railroads—Negligence—Personal Injury—Light or Warnings—Contributory Negligence—Evidence—Nonsuit.

Evidence tending to show that plaintiff was injured on a dark and cold night with a strong wind blowing, as he was walking along a path by the railroad track, about 2 feet from the end of the crossties, by being struck by defendant's switch engine running backward without lights or other warnings of its approach, is sufficient upon the question of defendant's negligence, and while it may be possible in this case that the plaintiff was himself negligent in walking too near the track or attempting to cross it without looking and listening, contributory negligence cannot be inferred as a matter of law, and a motion to nonsuit upon the evidence should not be sustained.

APPEAL from *Lane, J.*, at July Term, 1911, of BUNCOMBE.

Civil action for damages for personal injury.

At conclusion of the plaintiff's evidence his Honor sustained motion to nonsuit, and plaintiff appealed.

Craig, Martin & Thomason for plaintiff.

Moore & Rollins and Julius C. Martin for defendant.

BROWN, J. The following résumé of plaintiff's evidence is taken from the brief of the counsel for defendant: "The plaintiff testified that he was working at a tannery, some distance south of the public bridge across the French Broad River which leads from Asheville to West Asheville, where plaintiff lived; that the tannery was in Asheville, and on the morning of the injury he came from West Asheville to Asheville, crossed the public bridge, and walked along a street to the railroad, and then started and walked south along the railroad, between the tracks, until he was stricken by the engine. He testified that there was a path along on the right-hand side of the railroad track, in which he was walking, about 2 feet from the end of the crossties, and that many people walked that way; that there were several tracks there, and he was going along the way he usually went, when a switch engine struck him and drug him from 15 to 20 feet; that the engine was going backwards, and that it was the tender that struck him; that the end that struck him had no light on it; that the train was not running fast; that it knocked him down, and the engine ran 2 or 3 feet after they shut the steam off; that the accident happened 20 minutes past 6 in the morning."

The evidence further tends to prove that it was very dark and cold and a strong wind blowing; that the pathway had not been used by the public for ten years, to defendant's knowledge.

It is unnecessary to quote further from the evidence. It is possible that the plaintiff's injury may have resulted from his own negligence in walking too near the track or attempting to cross it without looking and listening, but this is not so apparent from the evidence that it must be inferred as matter of law.

We have said repeatedly that it is negligence to back an engine or train in the dark without a light on the tender or on the forward car. It may be there was a light on the end of the tender, but plaintiff testifies there was none. Had there been a light, it might have given timely notice of the approach of the tender and engine and thus warned and saved the plaintiff. We think the case comes within the principles laid down in *Hearener v. R. R.,* 141 N. C., 245; *Purnell v. R. R.,* 122 N. C., 832; *Stanley v. R. R.,* 120 N. C., 514.

The judgment of nonsuit is set aside.

New trial.

D. T. DOVER, ADMINISTRATOR, v. MAYES MANUFACTURING COMPANY.

(Filed 13 December, 1911.)

1. **Master and Servant—Driver of Teams—Negligence—Scope of Employment—Respondeat Superior.**

   The master is not responsible for the negligent acts of the servant employed for the ordinary duty of driving a team of mules hitched to a wagon for the purpose of hauling lumber, in causing an injury to one whom, in the absence of the master and without his knowledge, express or implied, he had permitted to ride on the wagon loaded with lumber; for such acts are beyond the scope of the servant's employment, and not done in furtherance of the duties owed by the servant to the master.

2. **Same—Implied Authority.**

   One who is employed to drive a team of mules to a wagon for the ordinary purposes of hauling has no implied authority from the master to permit boys to ride on the wagon, as such is not within the scope of the servant's employment.

3. **Same—Dangerous Instrumentalities.**

   The plaintiff's intestate having been killed from an injury received while riding on a wagon loaded with lumber drawn by a team of mules with a tendency to run away, in charge of the defendant's driver, with the permission of the driver and without the knowledge of the defendant, plaintiff brings his action on the grounds that the injury was inflicted through the negligence of the driver: *Held,* a team of mules and wagon is not a "dangerous instrumentality" within the meaning of *Stewart v.*

Lumber Co., 146 N. C., 85, making the master liable for the injury inflicted, without regard to whether the servant was acting beyond the scope of his employment.

APPEAL from *Biggs, J.*, at March Term, 1911, of MECKLENBURG.

Civil action for damages for the alleged negligent killing of William Dover, the son and intestate of plaintiff.

At conclusion of the evidence a judgment of nonsuit was ordered upon motion of defendant, and plaintiff excepted and appealed.

Burwell & Cansler for plaintiff.
A. G. Mangum, Osborne, Lucas & Cocke for defendant.

BROWN, J. The plaintiff's intestate, a boy 10 years old, was killed by the running away of a team of mules belonging to the defendant, Mayes Manufacturing Company, and in charge of one of its servants. The evidence offered by the plaintiff shows that the team was being driven by a negro boy 17 years old and was at the time pulling a wagon partially loaded with lumber which was being moved for the defendant. After the lumber was loaded, the plaintiff's intestate and two other small boys climbed on the wagon. There was also on the wagon with the driver another negro boy 18 or 19 years old. When the wagon was approaching a hill on a street in the village of Mayesworth, and just before starting up the hill, the negro driver made two of the white boys on the wagon get off, but let the Dover boy, plaintiff's intestate, remain on the wagon and permitted him to drive the mules, and while the boy was driving the negro boy stood up behind him and whipped the mules so that they trotted up the hill, and he continued to whip them until they passed over the top of the hill and out of sight of the witness. Another witness for the plaintiff testified that when he saw the mules they were running down the hill on the opposite side; that one of the negro boys had the reins and the Dover boy was sitting on the wagon in front of him, and that presently the negro boys jumped or fell from the wagon.

This witness then gives the following description of the manner in which the Dover boy was killed: "They ran on about 20 feet, and the lumber got to jogging and he got on his feet in some way and leaned over and the lumber carried him over, and as he went over the hind wheel struck him right across the head." There was evidence that the mules had run away several times before this accident, the runaways being attributed by the witnesses to several causes. Once the lumber was "punching" the mules, and in another instance a table which was being placed on the wagon fell on the mules, and one witness said he had seen them run away and did not know the cause.

Augustus Lay, a witness for the plaintiff, testified that he was manager of the defendant's store and had charge of the teams and farms; that these mules "would run off if a man is not there sufficient to hold them, if lumber jumps up and strikes them, or if a table or box strikes them"; that the boys in the village were in the habit of riding on the wagons, and he would run them off three or four times a day.

At the conclusion of the plaintiff's evidence, the court overruled defendant's motion for judgment of nonsuit, and the defendant introduced a number of witnesses whose testimony was directly opposed to that of the plaintiff. At the conclusion of all the evidence, upon an intimation of the court that he would charge the jury that if they believed the evidence the plaintiff was not entitled to recover, the plaintiff submitted to a judgment of nonsuit. The correctness of this ruling is the sole question presented for our determination.

At the very threshold of this case we are confronted with a state of facts which compels us to sustain the judgment of his Honor, *Judge Biggs*. Construed in the light most favorable to the plaintiff, the evidence establishes the fact his intestate was invited by the defendant's servant to ride on the wagon. It is not alleged, nor does it appear in evidence, that the servant had express authority to invite or permit boys to ride on the defendant's wagons. It was shown that the servant's duties were those of an ordinary driver of a team of mules, and that at the time of the accident he was engaged in the performance of such duties. We must hold upon this state of facts that he had no implied authority to permit boys to ride on his wagon, and that in doing so he acted beyond the scope of his employment. As authority for this conclusion we have only to repeat well-settled principles in the law of master and servant.

"In an action for tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable." *Howe v. Newmarch,* 94 Mass., 49; *Fleischner v. Durgin,* 207 Mass., 435. This doctrine so well expressed by the Supreme Court of Massachusetts has found ready acceptance and frequent application by our Court. *Roberts v. R. R.,* 143 N. C., 178; *Sawyer v. R. R.,* 142 N. C., 1; *Vassor v. R. R.,* 142 N. C., 68; *Hayes v. R. R.,* 141 N. C., 195; *Jackson v. Telephone Co.,* 139 N. C., 347; *Plamer v. Street Railway Co.,* 131 N. C., 250; *Cook v. R. R.,* 128 N. C., 333; *Pierce v. R. R.,* 124 N. C., 83; *Willis v. R. R.,* 120 N. C., 508; *Waters v. Lumber Co.,* 115 N. C., 648.

The recent case of *Marlowe v. Bland,* 154 N. C., 140, presents an interesting application of this principle. In that case a farm hand was directed to cut and pile certain cornstalks, and, without being directed to do so, he set fire to the pile, from which sparks were blown by the wind to defendant's woods, causing a fire and doing two or three hundred dollars of damage. Upon these facts we sustained a judgment of nonsuit, and in the opinion of the Court, written by *Mr. Justice Hoke,* will be found frequent quotations from the very thorough discussions of this question by *Mr. Justice Walker* in *Jackson v. Telephone Co., supra,* and in *Daniel v. R. R.,* 136 N. C., 517. In the latter case the learned justice says: "It is not intended to assert that a principal cannot be held responsible for the willful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts unless previously and expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, to give vent to some private feeling of his own (*McManus v. Crickett,* 1 East, 106); and as is forcibly stated by *Lord Kenyon* in the case cited, quoting in part from *Lord Holt*. 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts."

In his learned opinion in *Stewart v. Lumber Co.,* 146 N. C., at page 112, *Mr. Justice Walker* quotes this language from his opinion in the *Daniel case,* and well says: "What better authority can we invoke in support of our position than the opinions of the Court of King's Bench, as delivered by *Lord Holt* and *Lord Kenyon?*"

"The test of liability in all the cases," says *Mr. Justice Hoke* in *Sawyer v. R. R.*, 142 N. C., 1, "depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

This doctrine of *respondeat superior*, as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant and retains in his service only such servants as are prudent and trustworthy; the servant in the prosecution of the master's business must of necessity pass beyond his sight and out of his control; and yet the law makes the master liable for the conduct of the servant. The application of this principle without working the greatest injustice to every employer of a servant is made possible only by the limitation established by the courts, that when the servant does an act which is not within the scope of his employment the master is not liable. "Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship and the courts should guard against its extension or misapplication." *Holler v. Ross,* 68 N. J. Law, 324.

The authorities on this question from other courts are collected and fully discussed in the opinion of *Mr. Justice Connor* in *Stewart v. Lumber Co.*, 146 N. C., 85. The principal opinion in that case was not in conflict with the views expressed in the dissenting opinion upon the general principle of the liability of the master for the conduct of his servant when acting beyond the scope of his employment. The conflict arose upon the application of this principle to the willful and wanton conduct of an engineer in blowing his whistle for the purpose of frightening plaintiff's horses. We said in the opinion of the Court: "This immunity from liability for tort referred to is not generally extended to railroads, whose servants are entrusted with such dangerous instrumentalities and have thereby such unusual and extensive means of doing mischief." *Mr. Justice Walker* and *Mr. Justice Connor* entered vigorous dissents to this exception to the general rule, and maintained that the rule should be applied to railroads as well as to other employers, exempting them from liability for the wanton and malicious acts of their servants when beyond the scope of their employment.

We have a number of cases from other courts which directly sustain the position that the defendant's driver was not acting for his master when he permitted plaintiff's intestate to ride on the wagon. In the leading case of *Bowler v. O'Connell,* 162 Mass., 319, the servant of the defendant, a boy 13 years old, was leading a colt belonging to the defendant from the stables to defendant's yard, and invited the plaintiff, a boy between 5 and 6 years of age, to ride, and the plaintiff was kicked by the colt while going forward to accept the invitation. The Court, denying defendant's liability, says: "The true test of liability on the part of the defendants is this: was the invitation given in the course of doing this work or for the purpose of accomplishing it? Was the act done for the purpose or as a means of doing what Frank (the servant) was employed to do? If not, then in respect to that act he was not in the course of the defendant's business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the work of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt." This case was followed in *Driscoll v. Scanlon,* 165 Mass., 348, in which it is held: "If a driver of a cart invites an infant to drive with him, either for pleasure or to take his place in driving while he sleeps, and the infant falls from the cart and is run over by it, the act is outside the driver's authority, and his master is not liable to the infant."

"The owner of the wagon in charge of a skillful driver is not liable for the death of a child fatally injured in attempting to alight from the wagon after having climbed thereon at the invitation of the driver who was neither expressly nor by implication authorized to invite children to get upon the wagon, and whose act in doing so was in no sense within the scope of his employment or in furtherance of the master's business." *Stone Co. v. Pugh,* 115 Tenn., 688.

In *Kiernan v. Ice Co.,* 63 At., 998 (N. J.), it appeared from the testimony that the plaintiff, a boy of 15 years, was invited by the defendant's servant, engaged at the time in driving an ice wagon, to take a piece of ice from the wagon, and while he was in the act of doing so he was assaulted by the servant. In denying plaintiff's right to recover, the Court says: "There is nothing to show that Lahey (the driver) had any express or implied authority from the defendant to permit any one to take ice gratuitously from the wagon. Therefore, when Lahey gave such permission, he did it on his own responsibility and not as a servant of the defendant."

The Supreme Court of Michigan, in *Schulwitz v. Lumber Co.,* 126 Mich., 559, had occasion to apply this principle to a state of facts very similar to that presented in this case, and held that, "A master is not liable for the negligence of his servant in permitting a boy, contrary to the master's orders, to ride upon a wagon provided for the servant's use in hauling lumber, such act not being within the scope of the servant's employment." *Mahler v. Scott,* 129 Mich., 614; *Corrigan v. Hunter,* 122 S. W. (Ky.), 131; *Sweeden v. Improvement Co.,* 125 S. W. (Ark.), 439.

We cannot hold that a team of mules and wagon is a "dangerous instrumentality," and that the defendant should be made liable for the death of plaintiff's intestate without regard to whether the servant was acting beyond the scope of his employment. Pollock on Torts, 480. But if we should so hold, it would not change our decision, because the character of the mules was not the cause of the death of plaintiff's intestate. The accident was the result of the conduct of the defendant's servant, for which the defendant is not liable. *Dougherty v. Railway Co.,* 137 Iowa, 357.

The judgment of the Superior Court is

Affirmed.

J. W. LYTTON v. MARION MANUFACTURING COMPANY.

(Filed 13 December, 1911.)

1. **Evidence—Corporations—Officers—Declarations—Hearsay.**
   Declarations of officers are inadmissible as tending to show negligence on the part of the corporation in an action for damages, except when the declarations are shown to have been made by them in the line of their official duty at the time they are discharging this duty in a transaction for the company.

2. **Evidence—Negligence—Insurance—Third Parties.**
   In an action for damages for a personal injury, evidence that the defendant's liability for the act complained of has been insured by a third person is entirely foreign to the issue, and is incompetent.

APPEAL from *Long, J.,* at August Term, 1911, of RUTHERFORD.

Civil action brought for damages for personal injury received by plaintiff while in defendant's employment.

There was verdict for plaintiff upon the issues submitted, and from the judgment rendered the defendant appealed.

Solomon Gallert for plaintiff.

Ryburn & Hoey for defendant.

BROWN, J. The plaintiff was a machinist in the employment of defendant, and alleges that he was injured while operating a machine lathe by some defect in the mandrel furnished him.

The admission of the following evidence over the defendant's objection is assigned as error. On his redirect examination the plaintiff was asked the following question by his counsel:

"You testified, Mr. Lytton, in response to Mr. Ryburn's question, that you were still in the employ of the Marion Manufacturing Company, notwithstanding the fact that you met with this accident and are suing them, and I wish you would tell the court and the jury how it happens that you are still in the employ of that company?"

To this question he replied:

"A. Well, when I came back from the hospital Mr. D. D. Little, the president of the mill, come to me and said, 'Mr. Lytton, I want to know how you feel about this matter,' and I said, 'Mr. Little, I feel like I am injured for life, and that company is responsible for not furnishing me the proper material.' He said, 'Yes, Mr. Lytton, I expect you will have to sue, and you ought to have big damage,' and I said, 'Mr. Little, I want you to do something for me. I think the company is due me something; if they had furnished me the proper stuff I would not have been hurt. I would have two eyes now if they had give me the right steel in there and tools.' And he said, 'I am awfully sorry you are injured, and I can't do nothing for you myself, but don't be afraid to sue. It don't come off me. I would like to do something for you, but it's got to come off the insurance people, and it shan't have anything to do with your job. If you have to sue, go ahead. I hope you get something.'"

This evidence was incompetent, and should have been excluded. It is well settled that the declarations of officers of a corporation are competent only when made in the line of official duty and while the officer is discharging it in reference to a transaction for the corporation. *Younce v. Lumber Co.,* 155 N. C., 241, and cases cited; *Rumbough v. Imp. Co.,* 112 N. C., 751.

In addition to the incompetency of Little's declarations as mere hearsay, the subject-matter of the declaration is universally held to be incompetent and disconnected with the inquiry before the court.

Evidence that the defendant in an action for damages arising from an injury is insured in a casualty company is entirely foreign to the issues raised by the pleadings and is incompetent. By some courts it is held to be so dangerous as to justify another trial, even when the trial judge strikes it from the record.

Cosselmon v. Dunfee, 172 N. Y., 509; *Loughlin v. Brassil,* 187 N. Y., 128, 135; *Hordern v. Salvation Army,* 124 App. Div., 674, 676, 109 N. Y. Supp., 131; *Haigh v. Edelmeyer and M. H. Elevator Co.,* 123 App. Div., 376, 380, 107 N. Y. Supp., 936; *Manigold v. Black River Traction Co.,* 81 App. Div., 381, 80 N. Y. Supp., 861.

New trial.

CALDWELL LAND AND LUMBER COMPANY v. J. C. L. HAYES ET AL.

(Filed 6 December, 1911.)

1. **Nonsuit—New Action—Twelve Months—Limitation of Actions.**
The provision of Revisal, sec. 370, that after nonsuit the plaintiff may commence a new action on the same subject-matter within twelve months was not intended to abridge the time within which actions of that character may be brought, but to extend it.

2. **Same—Trespass—Timber Trees.**
In an action for damages for trespass and cutting timber trees, the action may be again commenced more than twelve months after judgment of nonsuit if not otherwise barred by the statute of limitations applicable. *Meekins v. R. R.,* 131 N. C., 1; *Trull v. R. R.,* 151 N. C., 547, cited and distinguished.

3. **Trespass—Timber Trees—Double Damages—Certain Counties—Interpretation of Statutes.**
In order to recover double damages for trespass and the unlawful cutting of timber trees in certain counties, Laws of 1907, ch. 320, the act complained of must come within the meaning of the words therein employed, *i. e.,* "without the consent of the owner (of the lands), with intent to convert to his (the trespasser's) own use," which means an intent to deprive the owner

of the use, and to appropriate to the use of the taker, and was intended to cover a trespass where there was no *bona fide* claim of right, committed under circumstances indicating a purpose to prevent the true owner from asserting his right.

4. **Same—Special Pleas.**

It is not necessary to specially plead the Laws of 1907, ch. 320, or refer to it in the complaint, when the act of the trespass and unlawful cutting of timber entitles the one upon whose lands the trespass is committed in the counties therein named to recover double the amount of the damages proved.

5. **Verdict — Judgment — Extent of Error Ascertained — Supreme Court—Procedure.**

Where under an erroneous instruction the jury has awarded double the amount of the damages actually sustained by the plaintiff in an action of trespass and unlawful cutting of timber trees in the counties specified in the Laws of 1907, ch. 320, and it can readily be ascertained from the verdict what sum is properly recoverable, the correction will be made in the Supreme Court without granting a new trial.

APPEAL from *Biggs, J.*, at March Term, 1911, of MECKLENBURG.

The plaintiff instituted two actions against the defendant.

In the complaint in the first it alleges that it is the owner in fee of a certain tract of land; that the defendant has unlawfully entered on a part thereof, under some pretended claim of title, which is void, and has cut timber thereon to its damage $300, and it demands that it be declared the owner of the land and recover $300 damages and costs.

In the second, the allegations are in substance as those contained in the first complaint, except another entry and trespass are alleged and the damage is laid at $1,500.

These actions were consolidated by consent.

The material allegations of the complaint were denied by the defendant.

On the trial, the plaintiff introduced Grant No. 951, from the State to G. N. Folk, dated December, 1874, calling for 640 acres of land, more or less, which grant was duly recorded in the register's office in Caldwell County, and then introduced a regular chain of title from this grant down to the plaintiff, there being no exception to plaintiff's title papers.

Plaintiff also introduced evidence locating the land covered by its grant and other title papers and evidence as to the defendant's cutting timber within the boundaries of plaintiff's title, claiming that in 1906 defendant cut about 26,000 feet of timber, and in 1907 about 48,000 feet, and in 1910 and 1911 about 51,340 feet, the total of the timber so cut amounting to about 125,340 feet, and that the damage was about $700 or $800.

The defendant introduced a grant from the State to himself, dated 30 August, 1905, and registered in Caldwell County, in Book 43, page 59, said grant being for 50 acres of land, and evidence locating said grant, which location showed that it was within the boundary of plaintiff's grant and title. Defendant also introduced evidence tending to show that the amount of timber cut by him from the land within the boundary of his grant, which was within the boundaries of plaintiff's title, was less than was claimed by plaintiff, and that the damage to plaintiff, if plaintiff was entitled to recover, would not exceed $130 to $150. Defendant further introduced in evidence the entire record in the case of the *Caldwell Land and Lumber Company v. J. C. L. Hayes,* consisting of the summons, prosecution bond thereon, together with the service and return thereon, the complaint and answer filed in the case, and the judgment of nonsuit taken by plaintiff in this case, the summons being dated 22 May, 1906, and the judgment of nonsuit taken at January Special Term of the Superior Court of Caldwell County, 1907, and then introduced the summons for relief, the basis of this action, together with the bond attached thereto, the service and return thereon, said summons being dated 13 November, 1908, and then introduced the complaint and answer in this case, showing that the causes of action were substantially the same in the several actions.

The defendant, at the conclusion of the evidence, moved the court to dismiss the plaintiff's cause of action, upon the ground that the same could not be maintained for that the plaintiff began an action on 22 May, 1906, in which it filed a complaint for the same cause of action now sued upon, and that at January Special Term, 1907, of Caldwell Superior Court, said plaintiff took a voluntary nonsuit, as appears from the judgment rendered in said cause; that in the complaints filed in the respective actions the same land is described and set forth and the same relief is asked, and that as more than twelve months have elapsed since the nonsuit was entered in the first-mentioned action up to the time the present action was begun, to wit, about twenty-two months, all of which is shown by the records offered in evidence, that the present action is barred by the statute limiting the time in which a new action may be begun after a nonsuit has been entered, and that therefore the court should so hold and dismiss plaintiff's action.

The court denied the defendant's motion and held that the present action was not barred by the statute of limitations referred to, and declined to dismiss plaintiff's action, and defendant excepted.

The defendant then, through his attorney, stated in open court that under his Honor's ruling declining to hold that plaintiff's action was barred and dismiss the same, that defendant would not contest before the jury the first and second issues submitted, as defendant, since plaintiff had introduced its title and evidence of location of the land, would not ask the jury to find that plaintiff has not located the land as claimed, but that defendant up to the conclusion of plaintiff's evidence of location had in good faith contested such, and that the only issue defendant desired to be heard upon was that as to damage.

All of the trespasses complained of occurred within three years prior to the commencement of this action.

His Honor, in his charge on the issue of damage, among other things, said: "That after you determine what amount of damage the plaintiff has sustained, if you find that the plaintiff has sustained damage, by reason of the timber cutting of the defendants prior to 23 February, 1907 (the date of the ratification of chapter 320, Public Laws of 1907), then you will proceed to determine what actual damages the plaintiff has sustained by the cutting of timber since that date, if you find that it has sustained any. If you shall find that the defendants have cut, felled, or removed any timber trees growing upon lands that you find to be plaintiff's, without the consent of the plaintiff and with the intent to convert the same to their own use, then you will double the actual damages which you find that plaintiff has sustained, if any, by cutting of timber since 23 February, 1907, by defendants, and such sum, added to the amount of actual damage sustained by plaintiff by reason of timber cutting by defendants prior to the said 23 February, 1907, if you find that plaintiff sustained such damage prior to that date, will be your answer to the issue," and the defendant excepted.

The jury rendered the following verdict:

1. Is the plaintiff the owner of the lands described in the complaint? Answer: Yes.

2. Has the defendant trespassed upon the said lands by cutting and removing timber therefrom? Answer: Yes.

3. What damage, if any, is plaintiff entitled to recover? Answer: $353.36.

51,340 feet at $4, double damage	$205.36
26,000 feet at $2	52.00
48,000 left in woods at $2	96.00
	$353.36

Judgment was rendered thereon, adjudging that the plaintiff was the owner of the land in Grant No. 951 to G. N. Folk, and that it recover $353.36 damages and costs.

The defendant excepted and appealed.

W. C. Newland and Mark Squires for plaintiff.
M. N. Harshaw and Councill & Yount for defendant.

ALLEN, J. It is admitted that the trespasses complained of occurred within three years prior to the commencement of this action, and that the plaintiff may recover damages therefor, unless a recovery is prevented by the fact that this action was not instituted within twelve months after a judgment of nonsuit in another action between the same parties, on the same cause of action.

The defendant relies on section 370 of the Revisal, providing that a new action may be commenced within twelve months after judgment of nonsuit, and insists that it is a limitation on the right of action; but it was expressly held otherwise in *Keener v.*

Goodson, 89 N. C., 279, the Court there saying: "The statute allowing actions to be brought within a year after judgment of nonsuit was intended to extend the period of limitations, but not to abridge it."

It is true that expressions may be found in *Meekins v. R. R.,* 131 N. C., 1, and in *Trull v. R. R.,* 151 N. C., 547, which, if considered without reference to the facts, might be understood to recognize a different rule, but there is no conflict between the cases.

In the *Meekins* and *Trull cases* the actions were brought to recover damages for the death of one alleged to have been killed negligently, and the defendant was contending that the right to bring such an action was conferred by statute; that it could only be brought within twelve months from death; that this was not a statute of limitations, but a condition affecting the cause of action itself, and, therefore, the section allowing a new action to be brought within twelve months after judgment of nonsuit did not apply to such action, and it was held that it applied to all actions.

There was no error in refusing to dismiss the action.

The second exception is to the charge of his Honor on the issue of damages.

The charge, if justified by the allegations of the complaint and the evidence, is authorized under chapter 320, Laws of 1907, which is applicable only to the counties of Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee, and Mitchell, and in which it is provided:

"SEC. 2. That in all cases where any person, firm, or corporation, their agents or employees, shall cut, fell, or remove any timber trees growing upon the lands of another without the consent of the owner thereof, with intent to convert to his own use, he, she, or they so offending shall be liable to pay to such owner double the value of such timber trees so cut down or felled, to be recovered in civil action to be brought therefor."

We do not think, however, that the complaint was framed under this statute, or that there was evidence which entitled the plaintiff to recover double damages.

We do not hold that it is necessary to refer to the statute in the complaint, or that the relief demanded controls the amount of the recovery, but we cannot treat as meaningless the words, "without the consent of the owner thereof, with intent to convert to his own use," upon which rests the right to recover double damages.

In the absence of the statute, the plaintiff was entitled to recover actual damages for an unlawful entry and trespass, and it must have been intended that something more than this should be alleged and proven to entitle one to double damages.

The language approaches closely to the definition of felonious intent in larceny, which is the intent to deprive the owner of the use, and to appropriate to the use of the taker, and was intended to cover a trespass where there is no *bona fide* claim of right, committed under circumstances indicating a purpose to prevent the true owner from asserting his right.

The complaint alleges no more than an unlawful entry and trespass and the evidence goes no further than the allegations of the complaint, and there was evidence that the defendant claimed under a grant from the State.

This being our construction of the statute, we must hold that neither the cause of action set out in the complaint nor the evidence introduced to support it entitled the plaintiff to recover double damages, and that the charge was, therefore, erroneous.

This would entitle the defendant to a new trial, if the answer to the issue was not so framed that the amount of the double damages may be eliminated, and the plaintiff's counsel requested that this be done, if it should be held that there was error in the charge.

The amount is ascertained by deducting from the total of damages, $353.36, one-half of the first item of $205.36, which will leave a balance of $250.68, upon which the plaintiff will be entitled to interest from the first day of May Term, 1911, of the Superior Court of Caldwell County.

The judgment rendered will be modified in accordance with this opinion, and as modified, is affirmed. Cost to be divided.

Modified and affirmed.

IN RE RICHARD WATSON.

(Filed 6 December, 1911.)

1. **Legislative Enactments — Constitutional Law — Interpretation—Courts.**

In passing upon the constitutionality of a legislative enactment it is the duty of the court to declare the law as expressed by the people in the Constitution, having respectful regard for the coördinate department of the Government in the Legislature, the agent of the people under their Constitution, resolving all reasonable doubts in favor of its acts.

2. **Same—Minors—Reformatory—Parens Patriæ.**

The Legislature has no unlimited and arbitrary power over minors in respect to detaining them in reformatories, and enactments relating thereto are justified only upon the idea that the child is without parental care, and that his environments are such that he may reach manhood without restraint or training under corrupting influences, unless the State, as *parens patriæ*, performs the duty which devolves primarily upon the parent.

3. **Same—Vagrants.**

The Legislature has constitutional authority to establish reformatories, "where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed," and therein youthful criminals may be detained and reformed before they become hardened in crime; and the legislative power in this respect exists, in the absence of a prohibition in the Constitution, though not expressly given.

4. **Same—Bill of Rights.**

The punishment for vagrancy cannot exceed thirty days under our statute, and a legislative act which provides for a longer detention of a child in a reformatory for that offense, if merely for the purpose of punishment, would be violative of section 14 of the Bill of Rights.

5. **Constitutional Law—Vagrants—Minors—Reformatory—Trial by Jury—Due Process.**

The constitutional right of trial by jury does not extend to an investigation into the status and needs of a child upon the question as to whether he should be sent to a reformatory for his own good as well as the good of the community in the interest of good citizenship, nor does the restraint therein put upon the child amount to a deprivation of his liberty without due process of law, within the meaning of the declaration of the Bill of Rights, nor is it a punishment for crime.

6. **Reformatory—Commitment—Parent and Child—Notice—Habeas Corpus.**

When a child is placed and detained in a reformatory under order of court, without notice to the parent or giving him an opportunity to be heard, the parent may have the legality of the detention inquired into upon his petition for a writ of *habeas corpus*.

7. **Same—Requisites.**

Upon the parent's petition for a writ of *habeas corpus* for his child detained in a reformatory under an order of court, he must show that he has applied to the authorities in charge of his child for his release, and that he was, at the time of the commitment, and still is, a fit and proper person to have the care of the child.

8. **Reformatory—"Conviction"—Sentence—Punishment — Interpretation of Statutes.**

The act creating the Stonewall Jackson Training School is "for the training and moral development of the criminally delinquent children of the State," and the superintendent is "intrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may, under the law, impose upon his own child," and in its general scheme and purposes is for the benefit of a child therein detained. Hence, the provisions in the act that the child committed thereto must be "convicted" and "sentenced" by the court, construing the act as a whole, does not mean that detention therein is an imprisonment as a punishment for a crime, but that the "conviction" is merely evidence that the child needs the care and nurture of the State, and that the sentence is an order of detention.

9. **Reformatory—Commitment—Irregularities—Habeas Corpus.**

Mere irregularity in the order of commitment by the court of a child to a proper reformatory will not entitle the child to a discharge upon the suing out of a writ of *habeas corpus*.

10. **Same—Age of Child—Parent and Child—Notice—Investigation —Corrections.**

Upon petition for *habeas corpus* by the father for the unlawful detention of his child committed to a reformatory by the court, it is proper for the judge upon the hearing to inquire into the age of the child when the court's record is silent thereon. The order of the committing magistrate should include a finding as to notice and of the age of the child, and show that it is made after investigation and because it is for the best interests of the child, and it is not error for this to be done at the hearing of the writ before judgment then rendered.

APPEAL from decision of *Mr. Justice Walker* in proceedings in *habeas corpus,* from MECKLENBURG.

This proceeding was commenced by a petition for a writ of *habeas corpus,* by S. S. Watson, in behalf of his minor son, Richard Watson, restrained in the Stonewall Jackson Manual Training and Industrial School since 27 August, 1909, by virtue of a conviction on that date in the recorder's court of the city of Charlotte for the crime of vagrancy, said petition being also made by S. S. Watson on his own behalf to regain the custody and care of his son. The petition was addressed to *Mr. Justice Walker,* under date of 27 July, 1911.

The writ was issued addressed to Walter Thompson, superintendent of the Stonewall Jackson Manual Training and Industrial School in Cabarrus County, returnable at Charlotte, 8 August, 1911. On the return thereto the hearing was held in chambers on said date at said place.

In the return to the writ the respondent justified the detention of Richard Watson by virtue of two commitments, one issued by the recorder of Charlotte, dated 27 August, 1909, and set forth above under heading, "Original commitment," and another issued *nunc pro tunc,* dated 25 July, 1911, as of 27 August, 1909, and set forth above under heading, "Commitment *nunc pro tunc,* No. 1," said commitment issued by the same authority as the original.

Petitioner, through his attorney, objected to the introduction or consideration by the court of "Commitment *nunc pro tunc,* No. 1," on the ground that the recorder had no authority to amend same from memory, and that the records of the court nowhere showed that at the time of the trial said Richard Watson was under the age of 16 years of age. Objection overruled. Petitioner excepted, which was petitioner's first exception.

Petitioner then objected to its introduction or consideration by the court, on the ground that the Commitment *nunc pro tunc,* No. 1, was addressed to the superintendent or keeper of the Stonewall Jackson Manual Training and Industrial School, whereas the original commitment was addressed to the keeper of the common jail of Mecklenburg County, and that the recorder was without authority to make such amendment. Objection overruled. Petitioner excepted, and this was petitioner's second exception.

Petitioner then moved the court to discharge Richard Watson from the custody of the respondent, in that in neither of the commitments did it appear what the age of the petitioner's son, Richard Watson, was at the time of the commitment, nor did such appear in any other records in the case, and that therefore there was nothing in the commitments or other records from which either the respondent or the petitioner's son, Richard Watson, could ascertain when the period of confinement would come to an end, and that each and both of said commitments were therefore void. Motion overruled. Petitioner excepted, and this was petitioner's third exception.

The petitioner then offered witnesses to prove that S. S. Watson, the father of the minor, Richard Watson, was at the date of the hearing a fit and proper person to have the custody of his son, and to prove the other allegations of paragraph 5 of the petition. Respondent's attorney, in open court, thereupon stated that they did not controvert the allegations of paragraph 5 of the petition. Whereupon petitioner, through his attorney, moved the court to order that S. S. Watson have the care and custody of his minor son, Richard Watson, and that the respondent deliver Richard Watson to him for said purpose. Motion overruled. Petitioner S. S. Watson excepted. This was petitioner's fourth exception.

The petitioner then moved the court to order the discharge of the said Richard Watson from the custody of the respondent, on the ground that Richard Watson had only been convicted of the crime of vagrancy, the punishment for which is fixed by law at thirty days imprisonment, and that Richard Watson had already been confined by virtue of the conviction for the crime of vagrancy nearly two years, and that any act of the Legislature purporting to authorize his detention for a period exceeding thirty days and extending over a period of at least five years for the conviction of the crime of vagrancy is unconstitutional and void, in that, in attempting to so authorize, it deprives him of the rights guaranteed to him as a citizen of this State and the United States contained in sections 1, 14, and 33, Article I of the Constitution of North Carolina, and Articles XIII and XIV of the amendments to the Constitution of the United States, and deprives him of his constitutional and natural rights in other particulars, all of which points are set forth in paragraph 4 of the petition. Motion denied. Petitioner excepted, and this was petitioner's fifth exception.

The court then, of its own motion, called to the stand S. S. Watson, and questioned him as to the age of Richard Watson, and as to what his age was at the date of the trial of said Richard Watson for vagrancy. Petitioner, through his attorney, objected on the ground that it was too late, at the hearing on the return to the writ of *habeas corpus,* to take testimony which should have been taken at the trial in the recorder's court, and which was not, and which finding of fact was necessary to have been ascertained and incorporated in the judgment and commitment to make the restraint of the petitioner's son legal. Objection overruled. Petitioner excepted, and this was petitioner's sixth exception.

Said S. S. Watson then testified as follows: "Richard Watson, my son, as nearly as I can remember, was born about the 29th day of November, 1894."

The court, then, of its own motion, called D. B. Smith, who was recorder of the city of Charlotte, 27 August, 1909, and who is now recorder, to the stand, and asked him whether or not he found as a fact at the trial of the said Richard Watson that he was under the age of 16 years. The recorder, Hon. D. B. Smith, testified as follows: "I took testimony at the trial and found that Richard Watson was at that time under the age of 16 years." The court then stated that the recorder might incorporate into the commitments and other records of the court the true age of Richard Watson at the time of said trial in the recorder's court, and also might correct the records in such other particulars as might be necessary. Petitioner objected on the ground that the court's power and authority on the return to the writ of *habeas corpus* was limited to the right to ascertain and judicially decree whether or not the petitioner's son was illegally restrained of his liberty at that time, and did not extend to taking testimony that should have been taken at the trial of the case in the recorder's court, which testimony was not taken, and did not extend to so adding to the records of the court as to make his detention, after such addition to the records, legal, where before taking such testimony after the return to the writ, and additions to the records, the restraint was illegal. Objection overruled, and this was petitioner's seventh exception.

In compliance with this action of the court, an additional commitment was issued by said recorder, and is found in the records under the head "Commitment *nunc pro tunc,* No. 2."

The court then rendered judgment as appears in the record, and the petitioner and the said Richard Watson duly excepted, and this was the petitioner's eighth exception. And thereupon the petitioner and the said Richard Watson appealed to the Supreme Court.

WARRANT FOR ARREST RICHARD WATSON.

NORTH CAROLINA—MECKLENBURG COUNTY.
CITY OF CHARLOTTE, IN THE RECORDER'S COURT.

THE STATE AND THE CITY OF CHARLOTTE
v.
RICHARD WATSON.
Before D. B. Smith, Recorder.

T. M. Christenbury, being duly sworn, complains and says that on or about the 25th day of August, 1909, Richard Watson, with force and arms, at and in the county aforesaid, and within the city limits, did willfully, maliciously, and unlawfully become a vagrant, spending his time in idleness, against the statute in such cases made and provided, and against the peace and dignity of the State, and in violation of the city ordinance. Sec. . . . ., chap. . . . ., page . . . . .

(Signed) T. M. CHRISTENBURY, *Complainant.*

Subscribed and sworn before me, this 25th day of August, 1909. (Signed) W. B. ORR, J. P. [SEAL.]

State of North Carolina,

To the Chief of Police of the City of Charlotte, or other lawful officer of Mecklenburg County—Greeting:

These are to command you forthwith to apprehend the said party and him have before D. B. Smith, recorder, at his office in the city of Charlotte, on the 26th day of August, 1909, then and there to answer the above complaint and be dealt with according to law.

Given under my hand and seal, this 25th day of August, 1909. (Signed) W. B. ORR, J. P. [SEAL.]

NORTH CAROLINA—MECKLENBURG COUNTY,

THE STATE AND CITY OF CHARLOTTE
v.
RICHARD WATSON.
} *Judgment.*

Upon the trial of this case, the defendant is guilty, and is ordered and adjudged that........to be committed to the Stonewall Jackson Training School.

This the 27th day of August, 1909.

(Signed) D. B. SMITH, *Recorder.*

ORIGINAL COMMITMENT.

MECKLENBURG COUNTY—BEFORE THE RECORDER OF CHARLOTTE.

STATE
v.
RICHARD WATSON.
} *Commitment.*

To the Keeper of the Common Jail of Said County—Greeting:

Whereas Richard Watson, the prisoner herewith sent you, has been required by me, the recorder of the city of Charlotte, you are hereby commanded to receive the said party in the Stonewall Jackson Training School.

He will be delivered to Officer J. E. McCall.

This the 27th day of August, 1909.

Charge: Vagrancy.

D. B. SMITH, *Recorder.*
W. B. ORR, *Desk Sergeant.*

COMMITMENT NUNC PRO TUNC, No. 1.

STATE OF NORTH CAROLINA—COUNTY OF MECKLENBURG.
BEFORE THE RECORDER OF THE CITY OF CHARLOTTE.

STATE AND CITY OF CHARLOTTE
v. } *Commitment.*
RICHARD WATSON.

To the Superintendent or Keeper of the Stonewall Jackson Manual Training and Industrial School—Greeting:

Whereas Richard Watson was, on the 27th day of August, 1909, convicted before the recorder of the city of Charlotte on the charge of vagrancy, and was ordered committed to your institution by the said recorder; and whereas doubts have arisen as to the proper form of the said commitment; and whereas it appears to the court that the said Richard Watson is less than 16 years of age, and the court is of the opinion that it would be best for the said Richard Watson and the community that the said Richard Watson should be sentenced to your institution to keep, restrain, and control him during his minority or until such time as you shall deem proper for his discharge, under such proper and humane rules and regulations as may be adopted by the governing board of your institution as provided by the statute: You are, therefore, hereby authorized and empowered to receive the said Richard Watson into the said Stonewall Jackson Manual Training and Industrial School, there to remain until he is discharged according to law and the rules and regulations of the said institution.

The said Richard Watson was delivered to you by Officer J. E. McCall.

This 25 July, 1911, as of 27 August, 1909.

(Signed) D. B. SMITH,
Recorder of the City of Charlotte, N. C.

COMMITMENT NUNC PRO TUNC, No. 2.

The following commitment was issued and filed after judgment, and bears date of the return day to the writ:

STATE OF NORTH CAROLINA—MECKLENBURG COUNTY.
BEFORE D. B. SMITH, RECORDER OF THE CITY OF CHARLOTTE.

STATE
v.
RICHARD WATSON.

The above-mentioned case coming on to be heard on 27 August, 1909, before the recorder of the city of Charlotte, upon a warrant duly issued, charging Richard Watson with being a vagrant, and having been heard, and it appearing to the court, and the court having found the following facts: That the said Richard Watson is under the age of 16 years, having been born on the 29th day of November, 1894, and that his father, with whom he has been residing, is being detained in the Mecklenburg County jail and is a confirmed dope fiend, and that his mother is dead, and his grandmother, with whom he has been living, is an inmate of the Mecklenburg County Home, and that the said Richard Watson has been loitering and sauntering about the streets of Charlotte, without any fixed place of abode and without any occupation or visible means of support:

It is, therefore, adjudged and found as a fact that the said Richard Watson is a vagrant and under 16 years of age; and the said recorder of the city of Charlotte, being of the opinion that it would be best for the said Richard Watson and this community in which he has been so convicted, that he should be sentenced to the Stonewall Jackson Manual Training and Industrial School.

It is also ordered and decreed that the said Richard Watson be committed to the Stonewall Jackson Manual Training and Industrial School, to the end that the trustees or other governing agencies thereof may keep, restrain, and control him during his minority, or until such time as they shall deem proper for his discharge, under such proper and humane rules and regulations as may be adopted by the said trustees, in accordance with the provisions of chapters 509 and 956 of the Public Laws of 1907.

This the 8th day of August, 1911, as of the 27th day of August, 1909. (Signed) D. B. SMITH,
Recorder of the City of Charlotte.

It was not denied that, at the time of the arrest and trial of Richard Watson for vagrancy, his father, the petitioner, was in jail and was then an unfit person to have the custody of his child.

William M. Wilson for appellants.
L. T. Hartsell and Shannonhouse & Jones for respondent.

ALLEN, J. The principal questions considered in the able and carefully prepared brief of counsel for the petitioner are that the detention of Richard Watson is illegal, for that:

The act establishing the Stonewall Jackson Training School is unconstitutional, because (1) it provides for imprisonment as a punishment for crime, and in excess of that fixed by statute for vagrancy, and for such a length of time that it is cruel or unusual; (2) under it he is deprived of his liberty without due process of law; (3) that his detention, under the statute, amounts to involuntary servitude.

The duty is imposed on the courts of passing on the constitutionality of an act of the Legislature when the question is presented, and this duty arises from the obligation to declare what the law is.

The courts recognize the principles declared in the Constitution, that it is "ordained and established" by the people of the State, and "that all political power is vested in and derived from the people," and when a statute, which is the work of legislators, who are agents of the people, is contrary to its provisions, they sustain the will of the people as expressed in the Constitution, and not the will of their agents.

Respectful regard, however, for a coördinate department of the Government demands that the duty shall not be lightly undertaken, and that in its performance all reasonable doubts shall be resolved in favor of the legality of legislation.

The principle is so declared by *Chief Justice Clark* in *Sutton v. Phillips*, 116 N. C., 504, in which he says: "While the courts have the power, and it is their duty, in proper cases, to declare an act of the Legislature unconstitutional, it is a well-recognized principle that the courts will not declare that this coördinate branch of the Government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people"; and by *Justice Hoke* in *S. v. Baskerville,* 141 N. C., 818, that "It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers."

Applying these rules of construction, can it be said that the act is unconstitutional?

In determining this question, we must consider the purpose for which the act was passed, and the grounds upon which the State can rightfully exercise the power to detain minor children.

It is not an unlimited and arbitrary power, and is justified only upon the idea that the child is without parental care, and that this environment is such that he may reach manhood without restraint or training and under corrupting influences, unless the State, as *parens patriæ,* performs the duty which devolves primarily on the parent.

Outside of the humanitarian idea, which properly has its influence on courts and legislatures, and considered solely from the materialistic view, each citizen is interested in having men and women honest and law-abiding, because this conduces to the safety of his person and property; and a system which does no more than measure the days and years, which must be paid by him who has violated law, "to satisfy justice," is a survival of the days when the only object of punishment was vengeance.

Under this system, society receives no protection, except as the example deters others from the commission of crime; no hope is held out to the convict, and he is imprisoned with other criminals with the knowledge that, in all probability, at the end of his term he will be turned loose upon society, an expert in crime.

It has always been a perplexing question how far society has the right to demand a day or an hour of his life as an example, when he has been permitted to live amid surroundings that nourish and stimulate the criminal tendency.

The purpose of the act before us is to meet, in some measure, the duty imposed upon society, for its own protection and for the good of the child.

When we turn to the Constitution, we find that the establishment of a reformatory is not only not prohibited, but that it is expressly authorized by Article XI, sec. 4, which says: "The General Assembly may provide for the erection of house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed," and a house of correction, "as its name indicates, is designed for the reformation of youthful criminals, those who have not yet become hardened in crime." *Ex parte Moore,* 72 Cal., 11.

We are also of opinion that the power would exist without this provision of the Constitution, in the absence of a prohibition in that instrument.

If, then, the Legislature has the power to establish a reformatory, has it rightfully exercised this power, or has it, under the guise of reformation, made it possible to imprison as a punishment for crime?

If the latter construction is adopted, the restraint of the son of the petitioner is illegal, because the punishment for vagrancy, the charge made against the son, cannot exceed imprisonment for thirty days, under the statute now in force, and the act under which a child might be held five years for that offense would be violative of section 14 of the Bill of Rights, which prohibits "cruel or unusual punishment."

The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime.

In *McLean County v. Humphreys,* 104 Ill., 378, it is said: "It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriæ,* to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise."

And in *Jarrard v. State,* 116 Ind., 97, 17 N. E., 912: "We think it settled, in accordance with principle, that the Legislature has power to provide for the reformation of boys who are entering upon a career of wickedness, by prescribing measures for committing them to a reformatory institution."

In *Ex parte Ah Peen,* 51 Cal., 280, it was held that proceedings resulting in the committing of a minor child to an industrial school did not deprive such child of his liberty without due process of law, such proceedings not amounting to a criminal prosecution; the Court saying: "The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the State, as *parens patriæ,* has succeeded to his control and stands *in loco parentis* to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are, by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves."

In *Reynolds v. Howe,* 51 Conn., 472, it was held that a statute providing that justices of the peace may commit to the State Reform School any boy under the age of 16 who is in danger of being brought up, or who is being brought up, to lead an idle or vicious life, does not deprive such minor of his liberty without due process of law, the Court saying: "But, as we have shown, the boy is not proceeded against as a criminal. Nor is confinement in the State Reform School a punishment, nor in any proper sense imprisonment. It is in the nature of a parental restraint. It is a mode of education to usefulness; compulsory, but not for that reason improper, and the restraint is a necessary incident of the compulsory education. It is all made necessary by the corrupting influences that surround and are likely to control the boy, and by the need of society for protection, and that necessity justifies the proceeding. To make the restraint and instruction of any permanent value, they must be continued for a long time. Habits are not changed in a month, not often in a year. This is specially true of bad habits. The attempt to reform viciously inclined boys would be an utter failure if limited to a few months."

In *Ex parte Liddell,* 29 Pac. R., 253, the Court says: "There can be no question as to the power of the Legislature to provide for the detention and education of juvenile offenders, as it has done in this act, and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true, the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the State prison, for the same offense, would be; but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. While detained for a longer period, perhaps, than he would be if sent to the State prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the State to make and enforce provisions for the compulsory education of all children within the State; and it is equally clear that the State may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to prepare them for honorable citizenship. The records of the penal institutions of this State show that a large majority of their inmates are young men—many of them juveniles. The Legislature in its wisdom has endeavored to provide a place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime. We think the policy of the act a wise one, and we see no constitutional ground for declaring it invalid."

In *Ex parte Crouse,* 4 Whart. (Pa.), 11, which was approved in *Roth v. House of Refuge,* 31 Md., 334, and in *Jarrard v. State,* 116 Ind., 98, the Court says: "The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol; and in respect to these, the constitutionality of the act which incorporated it stands clear of controversy. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living, and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parent, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ,* or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their privileges, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an inalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation, and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the Government is constituted, cannot be doubted. As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare." There are many others to the same effect. *Ex parte Ferrur,* 103 Ill., 372; *Refuge v. Ryan,* 37 Ohio St., 203; *Farnham v. Pierce,* 141 Mass., 204.

In some of the statutes on this subject provision is made for the detention of the child, when the parent is unworthy, although no charge of crime is preferred, while in others the basis of the order of commitment is a verdict of guilty, and in all the principle on which the authority for legislative interference rests is that the child may be saved and that society may be protected.

It is also usual to require notice to issue to the parent, and to give him an opportunity to be heard; and when this is not done, the parent may have the legality of the detention of the child inquired into, upon a petition for a writ of *habeas corpus.*

Upon the hearing of such petition, he will be required to show that he has applied to the authorities in charge of his child for his release; that he was a fit and proper person to have care of the child at the time of his commitment, and is still such. When it is remembered that if he was an unworthy parent when his child was taken charge of by the State, he had abdicated his parental authority, it is not unreasonable to say to him that the interest of the child and society have become paramount, and that these must be considered in passing upon his application for the custody of the child.

Let us, then, consider the terms of the statute.

The counsel for the petitioner contends that because only persons under the age of 16, who have been *convicted* of a criminal offense, can be admitted to the training school, and that the judicial officer is required to *sentence* such person, are conclusive evidences that the institution is penal and the object punishment.

The word "convicted" is sometimes used to embrace the judgment upon a verdict of guilty, but usually it refers to the verdict itself, and it is in this sense it is used in the statute. *Bugbee v. Boyce,* 68 Vt., 311. That it does not include the judgment is made clear by the fact that after conviction the officer must "sentence."

"Sentence" in its ordinary acceptation refers to a judgment of imprisonment, but it means more than this, and describes any judgment of a criminal court. *Allen v. Delaware,* 161 Pa., 550; *Wright v. Donaldson,* 158 Pa., 88; *People v. Adams,* 95 Mich., 541; *Com. v. Lockwood,* 109 Mass., 323.

If, therefore, these words stood alone, the contention of the petitioner could be sustained, but imprisonment or a punishment for crime is not necessarily inferred from their use, and when considered in connection with other parts of the statute, it is a reasonable construction that conviction is merely an evidence that the child needs the care and nurture of the State, and that the sentence is an order of detention.

The act (chapter 116a, Pell's Revisal) is entitled "Stonewall Jackson Manual Training and Industrial School," and it is "for the training and moral development of the criminally delinquent children of the State"; the superintendent is "intrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may, under the law, impose upon his own child"; the judicial officer is not authorized to commit a child, under 16, because he has been convicted, but only in the event that, after conviction, he "shall be of the opinion that it would be best for such person, and the community in which such person may be convicted, that such person should be so sentenced"; and it is made the duty of the officers in charge of the school to see that the children committed to it are instructed "in such rudimentary branches of useful knowledge as may be suited to their various ages and capacities"; to teach them useful trades and give them manual training, and also to teach "the precepts of the Holy Bible, good moral conduct, how to work, and to be industrious."

These are the obligations of the benign Christian parent, who does not punish or restrain the child except for its good.

We conclude, therefore, that when the act is considered as a whole, detention under its provisions is not imprisonment as a punishment for crime, and that it is constitutional.

If constitutional, the order of detention was authorized, and the courts would not discharge the child because of irregularities in the order or in the commitment.

"The writ of *habeas corpus* is not designed to fulfill the functions of an appeal or a writ of error. It is not intended to bring into review mere errors or irregularities, whether relating to substantive rights or to the law of procedure, committed by a court having jurisdiction over person and subject-matter." 21 Cyc., 285.

In *S. v. Armistead,* 106 N. C., 643, there was an irregular *mittimus,* and in discussing the effect of it the Court says: "The jailer, it may be, would have been authorized to refuse the prisoner until a fuller and more perfect *mittimus* was sent. The defendant certainly, if he chose, could have inquired into the legality of his detention in jail under it, by a writ of *habeas corpus.* The latter course, in this particular instance, would have availed little, however, as the judge, upon production of the justice's judgment, must have remanded the prisoner."

This clearly recognizes the principle that if one is restrained of his liberty under a judgment authorizing his detention, that he will not be discharged upon a petition for a writ of *habeas corpus* because the commitment or *mittimus* is irregular.

The age of the child was a material inquiry upon the hearing, and it was proper for the court to hear evidence upon it.

It is advisable for notice to be given to the parent before an order of detention is made, when this can be done, and for the order to include a finding as to notice and of the age of the child, and that it is made after investigation and because it is for the best interests of the child and of the community in which he is convicted.

We find no error, and the judgment of *Mr. Justice Walker* is

Affirmed.

T. C. EARNHARDT AND S. J. M. BROWN v. SOUTHERN RAILWAY COMPANY.

(Filed 6 December, 1911.)

1. **Railroads—Rights of Way—North Carolina Railroad—Charter—Presumption of Grant—Developments—Interpretation of Statutes—Time.**

According to its charter provisions the North Carolina Railroad Company could acquire a right of way for its railroad by condemnation proceedings, and section 29 was intended to provide for instances where these proceedings had not been instituted and evidence of the consent of the owners had been lost or could not be produced. The charter should be interpreted as of the time the Legislature granted it, and under the conditions then existing, and thus the provision therein that in the absence of a grant from the owner of the land, his right of action is barred if he fails to claim compensation within two years is valid, the statute raising a presumption of a grant of the land on which the road is located, together with a space of 100 feet on each side of the center of the track. *R. R. v. Olive*, 142 N. C., 273, cited and applied.

2. **Railroads—Rights of Way—Nonuser—North Carolina Railroad—Grant — Owners' Inactivity — Presumptions — Interpretation of Statutes.**

When the owner of land over which the North Carolina Railroad has been run has remained inactive for a period of two years after its completion, a presumption of a grant from the owner arises for the land on which the road is located, and for the width of the right of way provided by the charter.

3. **Same—Owner's Improvements—Damages.**

Semble, that as the presumption of a grant by the owner to the North Carolina Railroad does not arise except in the absence of a contract, when permanent structures erected by the owner within 100 feet of the main line are used for a long time without objection, in localities where it was customary to acquire rights of way by purchase, less in width than 100 feet, the statutory presumption would not arise, when no evidence of a contract was introduced by either party; and damages for permanent improvements on the right of way made in good faith may be recovered when the right of way is subsequently taken for the use of the railroad.

4. Same—Rights of Railroad.

When the North Carolina Railroad Company has acquired lands over which its road extends by reason of the presumption of a grant from the owner under the provisions of the statute, the subsequent use of an unoccupied part of the right of way by the owner, or those claiming under him, cannot affect the right of the company thereto from time to time as the development of its business demanded.

5. Same—Decision of Railroad.

It rests in the judgment of a railroad company to determine the necessity for the use of an unoccupied portion of its right of way in the development of its business. *R. R. v. Olive*, 142 N. C., 273, cited and applied.

6. Lessor and Lessee — North Carolina Railroad — Southern Railway—Right of Way—Nonuser—Occupation of Owner—Rights of Lessee.

The lease by the North Carolina Railroad Company to the Southern Railway Company of its road, franchise, and rights of property, to be operated by the latter, is a valid one; and as the North Carolina Railroad has, under its charter, the right to an unused part of its right of way for laying a double track in the development of its business, the same right extends to the Southern Railway Company under the lease.

APPEAL from *Lyon, J.*, at May Term, 1911, of ROWAN.

This is an action to recover the possession of a lot of land and damages for the wrongful entry thereon by the defendants.

The entry was made by the Southern Railway Company for the purpose of laying a double track.

It is not denied by the defendant that the plaintiffs are the owners of the land, subject to the easement and right of way of the North Carolina Railroad.

The land was originally a part of the Robards land, and the house now occupied by the plaintiffs has been built within six or seven years.

The plaintiff offered evidence tending to prove that, at the time of the entry, a dwelling-house was situate on said land about 55 feet from the center of the main line of the North Carolina Railroad Company; that in front of the house there is a yard, and between the yard and the railroad a roadway, and that by the entry of the Southern Railway to build the double track there is an interference with a part of said roadway, leaving a walkway outside of the plaintiffs' yard. Also that plaintiffs and those under whom they claim have been in possession of the land for about seventy years.

There was also evidence that in 1850 or 1851 there was a house on the Robards land, but the witnesses do not state where the house was located, nor is there any evidence that the double track, as now constructed, would interfere with any dwelling or yard in existence in 1850 or 1851.

The evidence as to the house tends to prove that a blacksmith shop or some temporary structure was on the land and not a permanent house.

The defendant offered evidence tending to prove that on account of increased business a double track was necessary, and that the Southern Railway had so determined, and that in its construction the right of way in use did not approach the dwelling-house of the plaintiffs nearer than 25 feet, and that the yard was not interfered with. Also that there was no house within 100 feet of the main line in 1850 or 1851.

The North Carolina Railroad was completed about 1854.

Section 27 of its charter provides for the condemnation of a right of way, and at the end of said section there is the following proviso: "*Provided further,* that the right of condemnation herein granted shall not authorize the said company to invade the dwelling-house, yard, garden, or burial ground of any individual without his consent."

Section 29 of said charter is as follows:

"SECTION 29. That in the absence of any contract or contracts with said company, in relation to lands through which the said road or its branches may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with the space of 100 feet on each side of the center of the said road, has been granted to the said company by the owner or owners thereof, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used for the purposes of said road, and no longer, unless the person or persons owning the said land at the time that part of the said road was finished, or those claiming under him, her or them, shall apply for an assessment of value of said lands, as hereinbefore directed, within two years next after that part of the said road which may be on said lands was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years after the said part was finished, he, she, or they shall be forever barred from recovering said land or having any assessment or compensation thereof: *Provided,* nothing herein contained shall forfeit the rights of *femes covert* or infants until two years after the removal of their respective disabilities."

No question is raised as to the proviso in section 29.

On 16 August, 1895, the North Carolina Railroad Company leased to the Southern Railway Company, for a term of ninety-nine years, its entire railroad, with all its franchises, rights of transportation, works and property, and said lease is now in force.

At the conclusion of the plaintiffs' evidence there was a motion to nonsuit, which was overruled, and after the introduction of evidence by the defendant the case was submitted to the jury, and pending its consideration his Honor granted the motion to nonsuit, and the plaintiffs excepted and appealed.

The plaintiffs' counsel contends in his brief:

(1) That there is evidence that a dwelling-house was situate on the land in controversy at the time of the construction of the North Carolina Railway, and, therefore, that said company could not acquire a right of way which would interfere with the house or yard.

(2) That if the North Carolina Railroad Company did not acquire a right of way, the Southern Railway Company has none, as it derives its powers and rights under its lease from the North Carolina Railroad Company.

(3) That if the North Carolina Railroad Company has a right of way, it is only to the extent that may be necessary to transact the business of the company, and does not include such

as may be needed by the business of the Southern Railway Company, much of which is the transportation of interstate passengers and freight.

(4) That laying the double track is an additional burden on the property of the plaintiffs, for which they are entitled to recover damages.

George W. Garland for plaintiff.
Linn & Linn for defendant.

ALLEN, J. The first question to be settled is whether the North Carolina Railroad Company has acquired a right of way 100 feet wide on each side of its main track over the land in controversy, because if it has not done so, the Southern Railway Company, which derives its powers under a lease from the North Carolina Company, has no such right of way.

It must be remembered, in the consideration of this question, that there is no evidence that the double track, as now laid, invades any house or yard as it existed in 1850 to 1851, nor that it invades the dwelling or yard of the plaintiff.

Section 27 of the charter of the North Carolina Company relates wholly to the acquisition of a right of way by condemnation proceedings, and of course a right of way could be acquired by deed or contract from the owner.

By section 29 it is intended to provide for cases where there has been no condemnation proceeding, and evidence of the consent of the owner has been lost or cannot be produced, and it says that, in the absence of contract, there arises a presumption of a grant from the owner for the land on which the road is located, together with a space of 100 feet on each side of the center of the track, and if the owner fails to claim compensation for such right of way within two years after the road is finished over his land, he is barred.

Provisions like these cannot be construed in the light of conditions as they exist to-day, but as they were when the charters were granted. As was well said by *Justice Connor,* in *R. R. v. Olive,* 142 N. C., 273: "The point of view from which charters for railroads were drawn in this State fifty years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred, not inconsistent with the exercise of the sovereign power of the State in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights of way were granted, or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be of sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the State, the capital stock to be subscribed by large numbers of people; Legislatures were ready to make broad concessions to these domestic corporations, and, as shown by the record in this and other cases in this Court, the owners of lands, because the 'benefits which will arise from the building of said railroads to the owners of the land over which the same may be constructed, will greatly exceed the loss which may be sustained by them,' were desirous to promote the building thereof, and to that end to give them rights of way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardship."

The effect of inaction on the part of the owner for a period of two years after the completion of the road has been considered in several cases in this Court, under charters similar to the one before us, and without difference of opinion, it has been held that under such circumstances, a presumption of a grant from the owner arises for the land on which the road is located and for the right of way provided for in the charter.

In *R. R. v. McCaskill,* 94 N. C., 751, *Chief Justice Smith,* discussing this question, says: "In whomsoever the estate was vested, there being no suggestion that they were under disabilities, it was, under the statute, as soon as the road was constructed, and *toties quoties* as it progressed towards conclusion, transferred to the corporation, of the required width of 100 feet on either side, to be paid for as directed, when no written contract has been entered into for the purchase. In such case the inaction of the owner in enforcing his demand for compensation for land taken and appropriated after the finishing of the construction of the road thereon, for the space of two years thereafter, raises, under the statute, a presumption of a conveyance and of satisfaction, and hence becomes a bar to an assertion by legal process, of such claim. . . . The presumption of the conveyance arises from the company's act in taking possession and building the railway, when in the absence of a contract the owner fails to take steps, for two years after it has been completed, for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated, of the specific breadth, unaffected by the ordinary rules in reference to repelling presumptions."

This statement of the law, as modified by *R. R. v. Sturgeon*, 120 N. C., 225, has been approved in *R. R. v. Olive*, 142 N. C., 272; *Parks v. R. R.*, 143 N. C., 293; *R. R. v. New Bern*, 147 N. C., 168; *Muse v. R. R.*, 149 N. C., 446, and in other cases.

Speaking of the effect of the *Sturgeon case*, *Justice Connor* said in *Barker v. R. R.*, 137 N. C., 220: "It is there held that under similar conditions, construing the same language, the road acquired, not a title to the land, but an easement which entitles it to possession of the whole right of way only when it shall appear that it is necessary for its purposes in the conduct of its business. We do not understand that in any of the decisions of this Court the doctrine of *McCaskill's case* has been otherwise modified."

It will be noted that the presumption does not arise except in the absence of a contract, and it may be that where permanent structures have been erected by the owner of the land, within 100 feet of the main line, and have been used for a long time without objection, and also in localities where it is customary to acquire rights of way by purchase, less in width than 100 feet, that the presumption would not arise when neither party introduces any evidence that there was no contract.

It is also intimated in *McCaskill's case* and in *Gudger v. R. R.*, 106 N. C., 484, that there may be a recovery for permanent improvements, made without objection, and in good faith, in the event the right of way is taken for the use of the railroad.

These questions are not, however, before us on this appeal.

It follows, therefore, that there is a presumption that the then owner of the land granted to the North Carolina Railroad a right of way over the land in controversy, and if so, the subsequent use of the land by the owner or by those who claim under him, as shown by the evidence in this case, could not affect the right. Rev., sec. 388; *R. R. v. McCaskill,* 94 N. C., 746; *Muse v. R. R.,* 149 N. C., 446.

It is also well settled that if the North Carolina Railroad acquired the right of way over the land, it was not required to use all of it, but could use such parts of it from time to time as the development of its business demanded.

In *Thomason v. R. R.,* 142 N. C., 322, the Court so holds, and it is there said: "It would seem that, upon the reason of the thing and from the nature of and the purpose for which the powers are granted, when the company acquired the right of way, in the absence of any restrictions, either in the charter or the grant, if one was made, it became invested with the power to use it, not only to the extent necessary to meet the then present demands, but such further demands as arose from the increase of its business and the proper discharge of its duty to the public. Any other construction of its charter, in this respect, would defeat the very purpose for which it was created—the growth and development of the resources of the country through which it was constructed. It would seriously interfere with railroads in the discharge of their duty to the public in a country the population and business of which are rapidly increasing, if because, to meet and encourage these conditions, they doubled their tracks, erected larger depots, made connections with branch lines, etc., new rights of action accrued against them in regard to the use of their right of way."

And it is also held that, "As the company is held accountable for the condition of its right of way, and may be compelled to build side-tracks and other structures necessary for the discharge of its duties to the public, it must have the corelative right to be the judge of the necessity and extent of such use." *R. R. v. Olive, supra.*

If the North Carolina Company has the right of way over the land in controversy, and has the right to lay a double track thereon, the question remaining is, Can the Southern Railway Company do so?

The North Carolina Company has leased to the Southern Railway Company its road, franchises, and rights of property, and this lease is valid (*Hill v. R. R.,* 143 N. C., 539), and in passing on this same lease, *Chief Justice Clark* said in *McCullock v. R. R.,* 146 N. C., 317: "The Southern Railway Company, the defendant, as lessee of the North Carolina Railroad Company, is entitled to use said lot as fully as its lessor could have done (so far as this action is concerned), including any increased burden on the lot by reason of the increased business of said North Carolina Railroad Company's part of the business of the 'Southern,' whether the said business originates along the line of the North Carolina Railroad Company, or, originating elsewhere, is shipped to any point over the line of the North Carolina Railroad."

These authorities seem to answer the contentions of the plaintiffs, and to sustain fully the ruling of his Honor.

No error.

EMMA J. STOUT, ADMINISTRATRIX, *v.* THE VALLE CRUCIS, SHAWNEEHAW AND ELK PARK TURNPIKE COMPANY.

(Filed 6 December, 1911.)

Appeal and Error—Lower Court—Presumption of Correctness of Ruling—Exceptions to Questions Ruled Out—Prejudice.

One appealing from an exception to the action of the lower court in excluding a question asked of a witness must show that he has been prejudiced thereby, the presumption being in favor of the correctness of the ruling in the lower court; and when this does not appear of record the exception cannot be sustained. *Watts v. Warren,* 108 N. C., 517, cited and distinguished.

APPEAL from *Long, J.*, at Spring Term, 1911, of WATAUGA.

This is an action to recover damages for the death of the plaintiff's intestate, caused, as it is alleged, by the negligence of the defendant.

The facts, showing the nature of the controversy, are fully stated in the opinion on the former appeal in the action, reported in 153 N. C., 514.

The jury rendered the following verdict:

1. Was the death of plaintiff's intestate, W. A. Stout, caused by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. Did plaintiff's intestate, W. A. Stout, contribute by his negligence to his own injury? Answer: No.

3. What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: $2,100.

Judgment was rendered in accordance with the verdict, and the defendant excepted and appealed.

A. E. Norman, a witness for the plaintiff, testified: "I was at home the night Stout was killed. Heard of the injury just after midnight. Found deceased under the fill, leaning against a log, holding his broken knee. Leg broken twice; bruised between his hips; taken to my house; conscious when he got to my house; remained conscious for twenty-four hours, then became speechless and unconscious."

On cross-examination, he was asked: "Did you hear the deceased make any statement as to what happened immediately before he went off the road?" Objection by the plaintiff; sustained; defendant excepts.

This is the only exception appearing in the record.

T. A. Love and F. A. Linney for plaintiff.
L. D. Lowe and Edmund Jones for defendant.

ALLEN, J. The exception of the defendant cannot be sustained. There is a presumption in favor of the correctness of the ruling of his Honor, and it is incumbent on the defendant to show that it was erroneous and prejudicial, which it has not done.

We cannot see from the record that the witness heard the deceased make any statement, or, if one was made, its materiality does not appear, and if a new trial should be ordered, the question might be answered in the negative.

In *Knight v. Killebrew,* 86 N. C., 402, the Court says: "It is a settled rule that error cannot be assigned in the ruling out of evidence, unless it is distinctly shown what the evidence was, in order that its relevancy may appear, and that a prejudice has arisen from its rejection," citing *Whitesides v. Twitty,* 30 N. C., 431; *Bland v. O'Hagan,* 64 N. C., 471; *Street v. Bryan,* 65 N. C., 619, and *S. v. Purdie,* 67 N. C., 326. This ruling has been approved many times. *Sumner v. Chandler,* 92 N. C., 634; *S. v. McNair,* 93 N. C., 628; *S. v. Rhyne,* 109 N. C., 794; *Baker v. R. R.,* 144 N. C., 40.

The case of *Watts v. Warren,* 108 N. C., 517, relied on by the defendant, cites *Knight v. Killebrew* with approval, but holds that, under the facts there appearing, the question indicated clearly the evidence excluded.

The action was a creditor's bill against an administrator, to compel an accounting and settlement, and to set aside an assignment to the defendant of a policy of insurance on the life of the intestate.

"There was evidence tending to prove that the intestate and the defendant administrator were executors of their deceased father's will, and that the intestate in his lifetime had used very considerable sums of money—how much did not definitely appear—that belonged to legatees of the will, and that the defendant W. A. Warren had paid, and had to pay, the same, etc., and that such payments constituted part of the consideration paid by him for the policy of insurance."

The defendant was then examined in his own behalf, and was asked: "What payments have you made to other persons than J. B. Warren, in consideration of that assignment?"

Having offered evidence that he had paid considerable sums to the legatees, without being able to show definitely the amounts, it was reasonable to infer from the question that he would state the payments made, if allowed to answer.

The defendant does not come within this exception.

There is

No error.

ABERDEEN AND ASHBORO RAILROAD COMPANY v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 6 December, 1911.)

1. **Railroads—Permission to Use Track—Collision—Time Limit—Negligence — Contributory Negligence — Last Clear Chance — Issues—Evidence—Questions for Jury.**

The plaintiff railroad company applied to the defendant railroad company, a connecting line, for permission to go upon its main line to back cars upon a siding to be taken by the latter's train, and at first was refused permission on account of the schedule time of defendant's train, but later, on being informed this train was late, was given ten minutes within which to place said cars. While the plaintiff's train was on the defendant's main line preparing to back the cars into position, it was run into and damaged by one of defendant's trains where the track was straight for a mile and free from obstacles to the view. There was conflicting evidence as to whether the collision took place within or after the ten minutes of the permission: *Held*, a question for the jury: (1) if the collision occurred within the ten minutes allowed, the issue as to defendant's negligence should be answered in plaintiff's favor; (2) the plaintiff's contributory negligence would depend upon its negligent failure to get its train out of the way in the time limited under the rules of law properly applicable, to be determined on the entire facts relevant to the inquiry, including the fact that it was there by permit from defendant company, and with the purpose at the time of the impact of backing its train upon a siding; (3) if the collision occurred after the ten minutes permit it would amount as a conclusion of law to contributory negligence, under the duties imposed upon the plaintiff under the circumstances, continuing to the time of the impact; (4) the findings upon the issues of negligence and contributory negligence would exclude the necessity of an issue of the last clear chance.

2. **Same—Proximate Cause—Instructions—Appeal and Error.**

Under the circumstances of this case, instructions as to whether the plaintiff's train remaining upon the defendant's track after the expiration of its ten minutes permit was or was not the proximate cause of the injury received by a collision from defendant's train on its main line, with its imminent chances of arrival: *Held*, reversible error to defendant's prejudice, for which a new trial is granted.

3. **Railroads—Use of Track—Time Permit—Collision—Negligence—Counter Damage—Questions of Law.**

The plaintiff railroad company received permission from the defendant railroad company for its train to go upon the latter's main line for the space of ten minutes for the purpose of placing cars upon a siding to be taken by the latter's train. While doing so, the train of the defendant, imminently expected, arrived and collided with the plaintiff's train where the track was straight and unobstructed for a mile: *Held,* whether the collision occurred within or beyond the time limit permitted, the defendant cannot recover on its counter-case for damages, as plaintiff's entry on its track was by its permission, and the attendant circumstances showed that by the exercise of reasonable care the defendant's employees had ample opportunity to have stopped its train and avoided the injury.

Appeal from *Justice, J.,* at May Term, 1911, of Moore.

Civil action to recover damages by reason of a collision caused by alleged negligence of defendant company.

Plaintiff alleged and offered evidence tending to show that on or about 19 February, 1910, plaintiffs had a train on the main line of the Seaboard track at Aberdeen, N. C., and had been given proper permit to occupy said track for ten minutes, and within the time the train was negligently run into and seriously damaged by train No. 43 of defendant company, being a passenger train going south.

Defendant answered, denying negligence and charged contributory negligence on part of plaintiff. Defendants, by further averment, alleged that plaintiff's agents and employees were entirely to blame in the matter and had negligently caused the collision, thereby great damage was suffered by defendant company.

On issues submitted, the jury rendered the following verdict:

1. Was the property of the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by its own negligence contribute to the injury of its property, as alleged in the answer? Answer: No.

3. Notwithstanding the negligence of the plaintiff, could the defendant by the exercise of ordinary care have avoided the injury to plaintiff's property? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $8,000.

5. Was the defendant's property injured by the negligence of the plaintiff, as alleged and set out in the counterclaim pleaded by the defendant? Answer: No.

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

R. L. Burns, Douglass, Lyon & Douglass, and Jerome & Price for plaintiff.

Walter H. Neal and Murray Allen for defendant.

HOKE, J. After full and careful consideration, the Court is of opinion that the cause should again be submitted to the jury. There was evidence to the effect that on 19 February, 1910, a train of plaintiff company was on the main line of defendant's track at Aberdeen, N. C., with a permit to remain there for ten minutes, the evidence tending to show that the time would expire at 8:46 P. M. It was about the schedule time for a passenger train of defendant, No. 43, to arrive at Aberdeen, and plaintiff's conductor was at first refused permission, but on the necessity for it being urged, and No. 43 being reported late after consulting the train dispatcher at Hamlet, permission was given and the train entered on the track as stated, the purpose being to back the train and leave three sleepers on a siding, that they might be attached to a train of defendant company going north. While standing on the track and just as it was being signaled to back for the purpose indicated, the train was run into by passenger train of defendant company, No. 43, causing great damage to plaintiff's engine and several of the cars composing the train. The testimony showed that the track of defendant road towards the north was practically straight for a mile, affording ample opportunity for employees of defendant operating its train to observe and note the present placing of plaintiff's train and that 43 approached the station at about twenty to twenty-five miles per hour.

The evidence of plaintiff tended to show that the time limit of its permit had not expired at the time of the collision, and there was evidence on part of defendant tending to show that same occurred after the time limit had expired.

Upon this statement, sufficient to present the case in its general aspects, we are of opinion that the cause should be tried and determined on the *three* issues of negligence on part of defendant, contributory negligence on part of plaintiff, and, third, the issue as to damages in case the answer on the first and second require that the third issue should be determined. If the collision occurred before the time limit expired, the first issue should be answered in favor of plaintiff; and if before such time plaintiff was negligent in failing to get its train out of the way under the rules of law properly applicable, the second issue should be answered for defendant, this to be determined on the entire facts relevant to the inquiry, including the fact that it was there by permit from defendant company and with the purpose at the time of backing its train onto a siding.

If the collision occurred after the time limit expired, then, in view of all the facts in evidence, the obligation on the part of plaintiff's agents and employees to keep vigilant and continuous outlook and remove the train in time to avoid a collision was so insistent that a breach of duty in this respect would amount as a conclusion of law to contributory negligence continuing to the time of impact, and no recovery by plaintiff should be allowed.

In this view there is no place for the doctrine of the last clear chance, for all the controlling facts as to defendant's liability may and in this case should be determined on the first and second issues.

In the charge on the first issue and on the third as to the existence of the last clear chance, and on the fifth issue, that as to the responsibility of plaintiff, the court in various ways submitted the question of whether the remaining on the track by plaintiff's train after the time limit had expired was or was not the proximate cause of the injury, and in our view and considering the difficulty in obtaining the permit to enter on the track and the imminence of the arrival of No. 43, and other facts relevant to the inquiry, we think this was prejudicial error which entitles defendant to a new trial. Whether the collision occurred before or after the time limit expired, the defendant may not be allowed to recover, for the entry on the track was by its permission, and on all the evidence, if the placing of plaintiff's train constituted an obstruction on the main line in the direction defendant's passenger train was moving, the attendant circumstances showed that the defendant's employees had ample opportunity to have observed this and stopped its train in time to have avoided a collision. The view presented is in accord with the general principles applicable, as shown in *Exum v. R. R.*, 154 N. C., 418; *Edge v. R. R.*, 153 N. C., 212, and other cases.

For the error indicated, we are of opinion that a new trial should be awarded.

New trial.

SOUTHWEST NATIONAL BANK v. J. G. JUSTICE ET AL.

(Filed 6 December, 1911.)

Banks—Collection—Disputed Amount—Tender as Full Payment—Retention of Payment—Knowledge—Principal and Agent—Ratification.

The plaintiff bank sent to its correspondent a note of defendant for collection, which was protested and returned, and subsequently sent again for collection, when defendant tendered a smaller amount in full settlement, contending that this less sum was that actually owed, on account of payments that had not been credited, which the collecting bank received and agreed to forward to the plaintiff with a letter of explanation, for its acceptance or rejection. The plaintiff made no reply to this communication, and did not return or offer to return the sum received through its correspondent, and brings its action for the full recovery of the note, claiming the amount received therefrom as a credit thereon: *Held*, (1) by accepting the payment through its banking connection under the condition that it was to be in full settlement bars the plaintiff of further recovery; (2) the position that plaintiff was not aware of the positive conditions of the tender made by defendant to its bank of collection cannot avail plaintiff when, subsequently aware thereof, it insists on retaining the payment thus made, as such an act amounts to a ratification of its agent's act.

APPEAL from *Biggs, J.,* at July Term, 1911, of MITCHELL.

Civil action to recover a balance alleged to be due on a promissory note for $1,400.

Issue prepared as follows: Are defendants indebted to plaintiffs, and if so, in what amount?

At the close of testimony, the court having intimated his intention to charge the jury that on the evidence, if accepted by the jury, they would answer the issue No, plaintiff excepted, submitted to a nonsuit and appealed.

S. J. Ervin, W. C. Newland and Charles E. Greene for plaintiff.

J. W. Ragland for defendant.

HOKE, J. Plaintiff bank, holding a note for $1,400 on defendant, purporting to be due 1 August, 1909, with interest from 23 April, 1906, payable annually and on which there was a credit of $168 of date 11 August, 1908, sent the same for collection to the Mitchell County Bank of Bakersville, N. C., about two weeks before same was due. At maturity the cashier of the latter bank presented same for payment, which was refused and the note was duly protested and returned to plaintiff. Thereupon the note was again sent by plaintiffs to Mitchell County Bank for collection, was again presented, when defendants claimed that the note should have been for only $500, and not $1,400, and offered to pay $432 as the balance due on that basis, deducting the credit of $168 by reason of the former payment and gave that amount to the cashier to be tendered in full settlement of the note. The cashier having entered this as a credit on the note, sent the amount of the payment and this note to plaintiff, accompanied by the following letter:

GENTLEMEN:—We are returning herewith P. M. Brown *et al.'s* note for $1,400 and interest, inclosed to us in your letter of 5 August, and hand you herewith remittance of $432, which we have collected and credited on the back of note. The drawers of this paper claim that the note should have been for $500 instead of $1,400, and the $432 which they ask that we tender you is to cover the $500 and interest for three years and four months, making $600, less the $68 credit which appears on the back of the note. If you do not care to accept inclosed remittance, you can return same to us. We would suggest the name of Mr. Charles E. Greene as being a reliable and capable attorney.

Yours very truly,
(Signed) E. C. GUY, *Cashier.*

The drawers of the note tell me they will stand to be sued on the paper before making any further settlement.

The plaintiff made no reply to this communication, and without returning or offering to return the $432, claiming that same shall be considered only as a credit for that amount, instituted the present suit to recover the balance of the $1,400.

In our opinion, this letter gave clear intimation to plaintiff that if the money was retained it was to be in settlement of the claim, and under our decisions further recovery may not be allowed. *Aydlett v. Brown,* 153 N. C., 334; *Armstrong v. Lonon,* 149 N. C., 434; *Cline v. Rudisill,* 126 N. C., 523.

And if there was doubt as to the meaning of the letter, there can be none as to the fact that the money was turned over to the cashier of the Mitchell Bank as a tender in full settlement of the claim, and it is well established that a plaintiff cannot accept and hold on to the benefits of the transactions between the cashier and defendants and repudiate the conditions attached to it. The general principle was applied in a suit at the present term, *Sprunt v. May,* 156 N. C., 388, citing among other cases *Corbett v. Clute,* 137 N. C., 546; *Harris v. Delamar,* 38 N. C., 219; *Manufacturing Co. v. Cotton & Long,* 125 Ky., 750.

It is urged that plaintiff did not know the positive character of the tender when the letter was received transmitting the payment, but he knows it now and insists on retaining the money. The principle applicable is very well stated in 30 Cyc., p. 1267, as follows: "It is a well-settled principle of ratification that the principal must ratify the whole of an agent's unauthorized act or not at all, and cannot accept its beneficial results and repudiate its burdens. It follows as a general rule that if a principal with full knowledge of all the material facts takes and retains the benefits of the unauthorized act of his agent, he thereby ratifies such act and with the benefits accepts the burdens resulting therefrom." *R. R. v. R. R.*, 147 N. C., 385.

There is no error in the ruling of the court, and the judgment is

Affirmed.

L. J. BOWMAN v. W. L. BLANKENSHIP AND WIFE, ADA BLANKENSHIP.

(Filed 6 December, 1911.)

1. **Contracts—Express Terms—Local Custom—Evidence.**
An ordinary express contract which is definite, specific, and plain of meaning may not, as a rule, be changed or varied by evidence of local custom or usage.

2. **Same—Conflicting Evidence—Contracts in General Terms.**
Plaintiff sued for balance claimed to be due him by defendant for sawing lumber of the latter, and introduced evidence tending to prove that he had complied with his contract, which required that he was to saw it in a manner suitable for market and was to "edge it square so as to save loss at the mills." The defendant contended that he did not owe the amount sued for, and offered evidence tending to show that the plaintiff was to square it up and cut it for the shops, which defendant said he knew how to do and had the proper machinery for the purpose, but which he did not do: *Held*, in this case, that testimony tending to show that the lumber cut was "as good as any mill commonly cuts" was competent, in view of the conflicting evidence of what the contract really was, the plaintiff's testimony tending to establish an agreement in terms sufficiently general and indefinite to make the evidence admissible.

APPEAL from *Long, J.*, at May Term, 1911, of CATAWBA.

Civil action to recover $246.77, an amount alleged to be due plaintiff for sawing lumber.

There was denial of the debt to the amount alleged to be due. The jury rendered a verdict and in favor of plaintiff for the amount claimed. Judgment on the verdict, and defendant excepted and appealed.

A. A. Whitener for plaintiff.
W. A. Self and J. H. Burke for defendant.

HOKE, J. On the argument it was correctly contended by defendants' counsel that an ordinary express contract which is definite, specific, and plain of meaning may not as a rule be changed or varied by evidence of local custom or usage. *Cooper v. Purvis,* 46 N. C., 142; *Baseball Club v. Pickett,* 78 Ind., 375; *Brown v. Foster,* 113 Mass., 463; *Mearage v. Rosenthal,* 175 Mass., 358. But in our opinion the present case does not come within the principle. The plaintiff claimed and testified that he was to saw defendants' lumber in a manner suitable for market, and was to "edge it square so as to save loss at the mills"; that he had done the work according to contract, and the balance due was $246.77. Defendant contended and testified: "That plaintiff was to square it up. I told him we wanted the lumber cut for the shops; that defendant said he knew how to do this, said he had a good mill and a good edger and would square it up for the shops and do a guaranteed job." That a part of the lumber did not come up to the specifications. That the amount was not so much as claimed and the balance due was only about $60. In support of his position plaintiff introduced witnesses who testified—one, "That it was good lumber and was edged good." Another, W. A. Holler, "That he had had twenty-two years experience in sawing; that the lumber was all right, edged all right." Another, Thomas Moretz, "That he had had twenty years experience as sawyer, and it was cut as good as any mill commonly cuts."

The testimony was admitted over defendant's objection, his position being that each and every piece of the lumber was to be squared and that evidence to change this specific requirement because the lumber was good as "commonly cut," etc., was inadmissible.

There is doubt if by defendant's version of the contract the terms were sufficiently definite and precise as to render the testimony inadmissible, but there was dispute about the exact terms of the contract and its requirements, and plaintiff's testimony tended to establish an agreement in terms sufficiently general and indefinite as to justify reception of the evidence. We find no testimony that any of lumber was rejected at the shops because unsuitable.

The charge of the court gave defendant the full benefit of the position contended for by him; the jury, adopting plaintiff's version of the contract and facts relevant, have rendered a verdict for the full amount claimed, and we find no error which gives defendant any just ground for complaint.

No error.

VANGY CARRICK v. SOUTHERN POWER COMPANY.

(Filed 6 December, 1911.)

1. **Cities and Towns — Liability — Independent Contractor—Negligence—Streets and Sidewalks—Pedestrians.**

The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor.

2. **Same—Liability of Independent Contractor.**

The same principle of liability as applied to a city's responsibility for the acts of its independent contractor concerning dangerous places negligently left on its streets and sidewalks applies to the city's contractor who sublets the work to an independent contractor—that is, when the work that is being done for their benefit or by their procurement is of the kind to create a nuisance unless special care is taken, they are charged with the duty of safeguarding it, and they may not relieve themselves by delegating this duty to others.

3. **Same—Character of Work.**

One who has contracted with a city to do work upon its streets and sidewalks may not avoid liability upon the defense that the work was being done for him by an independent contractor, when the negligence complained of was leaving at night a hole 2 feet square at the opening and 4 or 5 feet deep on the edge of a sidewalk, extending partly in and leaving only a space of 3 to 5 feet for pedestrians to pass in going to or from their work along an unlighted street, without guard or signal lights of the danger.

4. **Cities and Towns—Streets and Sidewalks—Danger to Pedestrians—Contributory Negligence.**

In this case the evidence tended to show that the plaintiff fell at night into a hole in the sidewalk negligently left unguarded and without signal lights of the danger, while returning from his work at night: *Held*, no evidence sufficient to be submitted to the jury upon the question of contributory negligence. *Neal v. Marion*, 126 N. C., 412, cited and distinguished.

APPEAL from *Daniels, J.*, at April Term, 1911, of DAVIDSON.

Civil action to recover damages for personal injuries caused by alleged negligence of defendant company.

There were allegations, with evidence, tending to show that on 27 January, 1910, plaintiff, a fireman in a cotton mill, was going to his work along Salisbury Street, in the town of Lexington, N. C., his usual route, and fell into a hole near the edge of the sidewalk and partly on the sidewalk, and was seriously injured; that the hole was about 2 feet square at the top and 4 to 5 feet deep; about one-half of the opening being on the sidewalk and 3 to 5 feet from the inside fence and the hole was left without covering or without lights or warning of any kind and was dug by procurement of defendant company, who were constructing its line through the town, under permission of the municipal government, evidenced by an ordinance granting defendant a license for the purpose.

Defendant denied there was negligence in leaving the hole uncovered; alleged that the work was being done by an independent contractor, for whose conduct defendant was in no way responsible, and further, that plaintiff was well aware of the existence and placing of the hole and was guilty of contributory negligence at the time, and offered evidence in support of these positions. The jury rendered the following verdict:

1. Was the plaintiff injured by and through the negligence of the defendant? Answer: Yes.

2. Did the plaintiff contribute to his own injury by his negligence? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $1,200.

Judgment for plaintiff, and defendant excepted and appealed.

McCrary & McCrary and Phillips & Bower for plaintiff.
Walser & Walser and Osborne, Lucas & Cocke for defendant.

HOKE, J., after stating the case: The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor. *Bailey v. Winston, ante,* 252, and authorities cited, more especially *Bennett v. Mount Vernon,* 124 Iowa, 537; *Brusso v. City of Buffalo,* 90 N. Y., 697, and see an instructive case on this subject, *City of Baltimore v. O'Donnell,* 53 Md., 110. The same principle holds as to the obligations of licensees and independent contractors, doing work of the kind suggested, that is, when the work that is being done for their benefit or by their procurement is of a kind to create a nuisance unless special care is taken, they are charged with the duty of properly safeguarding it, and may not relieve themselves by delegating the duty to others. *Bridge Co. v. Steinbach,* 61 Ohio St., 375, reported also in 76 Amer. St., 675; *City of Anderson v. Fleming,* 160 Ind., 597; *Spentz v. Schultz,* 103 Cal., 208; *Curtis v. Kily,* 153 Mass., 123; *Village of Jefferson v. Clapman,* 127 Ill., 438; *Cameron Mill Co. v. Anderson,* 98 Texas, 156; *Rock v. Construction Co.,* 120 La., 831; *McCarrier v. Hollister,* 15 S. D., 366; Mohl Independent Contractors, sec. 75. In *Rock v. Construction Co., supra,* the Court held as follows: "As a municipal corporation would itself be liable to a citizen for injury sustained by reason of its reducing a sidewalk to a dangerous condition, it is evident that the privilege granted by it to a public utility company of making excavations therein cannot authorize such company to leave the excavations so made unguarded and to dispense with all precautions, whereby those who are rightfully using the sidewalk may be warned of their existence. Nor can the company in such case escape liability on the plea that an excavation, made under the authority conferred on it and for its account and benefit, has been made by an independent contractor."

In *Bridge Co. v. Steinbach, supra, Marshall, J.,* delivering the opinion, said: "The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work that he is about to do or have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to another's injury"; and, in the citation to Mohl, *supra,* the author, in reference to street excavations, says, correctly, we think, that "digging trenches in highways or across footpaths has been considered by many, if not most, courts so dangerous as not to be assignable so far as liability is concerned. An incorporated company undertaking to lower the grade of its road while in the receipt of tolls, and while the road is open for travelers, is bound to guard that part retained for public use, to warn travelers of danger threatened by obstructions, and by suitable devices to direct them in the proper route; of which duties it may not divest itself by shifting the responsibility to others." A contrary doctrine which seems to have prevailed in certain cases relied upon by defendant, as in *Hackett v. Telegraph Co.,* 80 Wis., 187; *Smith v. Simmons,* 103 Pa., 32, etc., are expressly disapproved in some of the decisions to which we have referred, and are, we think, contrary to the great weight of authority.

The position chiefly relied upon by defendant, that it is relieved of responsibility, if any existed, because the work was being done by an independent contractor, may not therefore be sustained. The hole, 2 feet square at the opening and 4 or 5 feet deep, on the edge of a sidewalk, extending partly in and leaving only a space of 3 to 5 feet for pedestrians to pass, going to or from their work, along an unlighted street, comes well within the principle stated, and defendant has been properly held responsible for the neglect established and its consequences.

The evidence hardly presents the question of contributory negligence, for the only testimony we find, on the part of defendant, tending to fix knowledge of the existence of the hole on plaintiff, also tends to show that the hole was being covered over; but if it were otherwise, the question was submitted under the principles recognized as sound in *Russell v. Monroe,* 116 N. C., 721, and there is no error, to defendant's prejudice, in having referred the matter to the jury's decision. In *Neal v. Marion,* 126 N. C., 412, the claimant, with full knowledge of conditions and contrary to the general custom, had voluntarily chosen to go along an abandoned and neglected walkway when there was a good safe way provided on the opposite side of the road, and the case has no proper application to the facts presented here. There is no error, and the judgment on the verdict is affirmed.

No error.

HENRY JOHNSON v. CAROLINA, CLINCHFIELD AND OHIO RAILROAD COMPANY ET AL.

(Filed 13 December, 1911.)

1. **Contracts—Independent Contractor—Negligence—Supervision.**
   When a contractor has undertaken to do a piece of work according to plans and specifications furnished and under an agreement for its completion such as otherwise to make him an independent contractor for whose negligent acts the owner or proprietor is not responsible, this relationship is not necessarily affected or changed because the right is reserved for the engineer, architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that it is done pursuant to the terms of the contract.

2. **Contracts—Independent Contractor—Negligence—Collateral Employment—Respondeat Superior.**
   The owner or proprietor of work to be done by an independent contractor cannot escape liability upon the ground that an injury was inflicted by the act of an independent contractor, when the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not acting *bona fide* under the terms of the contract, but was, in fact, only the agent of the owner or proprietor in the work that plaintiff was engaged in doing. *Young v. Lumber Co.,* 147 N. C., 26, cited and applied.

APPEAL from *Lane, J.*, at June Term, 1911, of BURKE.

Civil action to recover damages for physical injuries caused by alleged negligence of the railroad company.

There was evidence tending to show that on or about 15 July, 1908, plaintiff was injured while at work as an employee of defendant company by reason of a defective car being then used for hauling dirt in the construction of defendant road, and that the injury was attributable to the negligence of defendant. There was evidence tending to show that there was no negligence; that plaintiff was, at the time, an employee of Propts & Co., an independent contractor, and further that plaintiff had executed a receipt in full discharge for the liability. The following verdict was rendered:

1. Was plaintiff injured by the negligence of the defendant? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his own injury? Answer: No.

3. Did the plaintiff release any cause of action he had against defendant on account of such injury? Answer: No.

4. What injury, if any, is plaintiff entitled to recover? Answer: $200.

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Spainhour & Mull and S. J. Ervin for plaintiff.
Hudgins & Watson and A. Hall Johnston for defendant.

HOKE, J. It was chiefly objected to the validity of this recovery that plaintiff was, at the time, the employee of an independent contractor, Propts & Co., and that, on the facts in evidence, there had been no breach of duty towards plaintiff on the part of the railroad company. This doctrine of independent contractor and its effect on the rights of parties have been the subject-matter of discussion in several recent decisions of the Court, as in *Hopper v. Ordway, ante*, 125; *Denny v. Burlington*, 155 N. C., 33; *Beal v. Fiber Co.,* 154 N. C., 147; *Thomas v. Lumber Co.,* 153 N. C., 351; *Hunter v. R. R.,* 152 N. C., 682; *Young v. Lumber Co.,* 147 N. C., 26; *Davis v. Summerfield,* 133 N. C., 325; *Craft v. Timber Co.,* 132 N. C., 151.

In *Beal v. Fiber Co.* the following, as general definitions, are referred to with approval: "An independent contractor has also been defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work."

Lurton, J., in *Powell v. Construction Co.,* 88 Tenn., 692, and from *Smith v. Simmons,* 103 Pa., 32: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone and not the employer is liable for damages caused by the contractor's negligence in the execution of the work."

Hopper v. Ordway, ante, 125, and *Denny v. Burlington,* support the proposition that, when a contractor has undertaken to do a piece of work, according to plans and specifications furnished, and within the meaning of the definitions referred to, this relationship of independent contractor is not affected or changed because the right is reserved for the engineer, architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that the same is done pursuant to the terms of the contract. The position is carefully stated in *Denny's case* as follows: "When the relation of independent contractor has been established and the work is to be done according to plans and specifications furnished, the mere fact that a supervisor of the contractee is present for the purpose of seeing that the work is being done according to the contract, at the time the tort complained of is committed, does not render the contractee liable therefor." And *Hopper's case, supra,* is in full approval of this statement. Again, in *Beal's case,* citation is made from Thompson on Negligence, as follows: "If the proprietor retains for himself or for his agent (*e. g.,* architect and superintendent) a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of *respondeat superior* operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts or not. It is not necessary, in such a case, that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control."

On the facts of this case and on the various contracts presented for consideration, the rights of supervision and control reserved to the engineer of the railroad company are so extensive and all-pervading that we incline to the opinion that these operators may not maintain the position of independent contractors, but are themselves only representatives and agents of the company, for whose acts the company is, in the main, responsible. It is not necessary to decide the question, however, as the jury, under a correct charge, have found as a fact that the plaintiff's immediate employer, at the time of the injury, and in reference thereto, was not acting *bona fide* under the terms of the contract, but was, in fact, only the agent of the company in the work that plaintiff was engaged in doing. The position was recognized in *Young v. Lumber Co., supra,* and in our opinion there was evidence in the present case permitting its consideration. There is no error, and the judgment below is affirmed.

No error.

H. B. MORSE ET AL. v. J. B. FREEMAN.

(Filed 13 December, 1911.)

1. **Deeds and Conveyances—Title—Common Source—Color of Title—Evidence, Conflicting—Nonsuit.**

In an action involving the title to a lappage of land by deed, both parties claiming from a common source, it was admitted that the plaintiff's deed covered the *locus in quo,* the plaintiff asserting ownership by reason of seven years adverse possession under color of title. Upon conflicting evidence as to defendant's possession: *Held*, a motion to nonsuit was properly overruled.

2. Evidence—Maps.

An unofficial map may be used by witnesses to illustrate their testimony, and in this case the one objected to was enlarged by the surveyor from the court map, who testified to its correctness, without evidence to the contrary, and without objection, and it was *Held*, no error.

3. Deeds and Conveyances — Calls — Course and Distance — "Lappage"—Color of Title.

The plaintiff and defendant claimed the *locus in quo* from a common source of title, the lands admittedly a lappage within the description of both deeds, the defendant's deed being senior in date and registration, and describing the line in dispute as "along the upper edge of the cliff . . . in a westwardly direction to the beginning." There was conflicting evidence as to whether there was a line of "cliffs" coming within the description, and it appears that if "course and distance" governed, the line would go straight to the beginning and exclude the *locus in quo* from defendant's deed. An instruction held correct which substantially charged, (1) that in fixing the disputed line the course and distance would control if under the evidence the jury should find there were no cliffs that would fit the description in the defendant's deed; (2) that if the plaintiff had been in possession of the lap, or any part thereof continuously, adversely, notoriously, and exclusively for seven years next before the institution of the action, it would ripen the title to the lands in the plaintiff.

4. Appeal and Error—Assignments of Error—Objections and Exceptions.

An assignment of error not based on any exception appearing of record will not be considered on appeal.

APPEAL from *Lane, J.*, at February Term, 1911, of RUTHERFORD.

This is an action to recover possession of a tract of land, which was commenced on 30 December, 1909.

The defendant denies the plaintiff's title, but admits that he is in possession of a part of the land described in the complaint.

Both parties claim under deeds from J. B. Freeman, the deed under which the defendant claims being senior in date and registration.

The deed to the plaintiff is dated 12 December, 1902, and it is admitted that it covers the land in controversy.

The plaintiff offered evidence that he had used the property (a part of the Chimney Rock property) for scenic purposes since the date of his deed, and that he had kept men on it as watchmen and toll-keepers all the year.

The principal contention between the parties is as to the location of the last call in the defendant's deed, "thence along the upper edge of the cliff, above Chimney Rock, in a westerly direction to the beginning," the defendant contending that there was a line of cliffs which the call in the deed would follow, and the plaintiff that there were no cliffs, and that the last line would go straight to the beginning.

If the line is run straight to the beginning, it does not cover the land in controversy, and the evidence was conflicting as to whether there was a line of cliffs.

There was no evidence when the defendant entered into possession. The jury answered the issues in favor of the plaintiff, and from a judgment entered thereon, defendant appealed.

Smith & Shipman for plaintiff.
McBrayer, McBrayer & McRorie for defendant.

ALLEN, J. The motion to nonsuit was properly overruled. As both parties claimed title under a common source, the decision of the controversy between the parties depended upon two facts:

1. Did the deed of the defendant cover the land?
2. If so, had the plaintiff held the land adversely for seven years under his deed?

If the deed of the defendant did not cover the land, the plaintiff was the owner, because both claimed under Freeman, and it was admitted that the land was included in the deed of the plaintiff. If the deed of the defendant did include the dispute, the plaintiff was the owner if he had held possession adversely for seven years under his deed.

Evidence was offered to sustain both contentions of the plaintiff, and, therefore, a judgment of nonsuit could not have been entered.

During the trial the surveyor was allowed to post up in sight of the court and jury a map made on a large scale, purporting to be a copy of the court map, and the witness was allowed to refer to said map as a matter of demonstration, after the surveyor had stated that it was a *facsimile* or reproduction on a large scale of the court map. The use of this map by the witness and by the attorneys in the examination of the witness was objected to by defendant's counsel.

It does not appear that any exception was entered by the defendant to the use of the map, but if it had been done, we think no error was committed. An unofficial map may be used by a witness to illustrate his testimony, and it can make no difference that it is posted on a wall, but in this instance the map was simply an enlargement of the one made under order of the court, and there is no suggestion that it was not correct.

The defendant also excepts to the following parts of the charge, which, in our opinion, are well supported by the authorities:

1. But if you find from the greater weight of the evidence that there are no natural boundaries, or, in other words, cliffs, or no such cliffs in no such place as are called for, and you, calling to your aid all the evidence in the case, are unable to locate the objects; and you find further that the last call in the deed is a straight line from the stake at figure 5 on the map to the beginning, you will answer the first issue "Yes," since where the natural objects or boundaries have not been fixed and ascertained, then course and distance must govern the jury in fixing the line; therefore, if you locate the line by course and distance, you will find for the plaintiff.

2. That if the jury should find for defendant on the location of his deed, still if the jury shall find from the evidence that the plaintiffs have, claiming under their deed, been in the possession of the lap, or interference, or any part thereof, continuously, adversely, notoriously, and conclusively for seven years before the suit was brought, 30 December, 1909, no other person being seated on the lap, this would ripen the plaintiff's title, and he should recover.

There is one other assignment of error, but it is not based on any exception appearing in the record, and therefore cannot be considered. *Thompson v. R. R.,* 147 N. C., 412.

The assignments of error are for the purpose of grouping exceptions already taken, and not to introduce new exceptions.

Upon an examination of the whole record, we find

No error.

ELLIOTT SIMMONS ET AL. v. THOMAS J. FLEMING.

(Filed 13 December, 1911.)

1. **Pleadings—Lands—Lis Pendens.**

In an action to recover lands, the filing of the complaint, in which the property is described and the purpose of the action stated, operates as a *lis pendens.*

2. **Same—Deeds and Conveyances—Registration—Notice.**

When a complaint in an action to recover lands operates as a *lis pendens*, evidence as to the date of a deed to a purchaser thereof for value subsequently registered becomes immaterial, as the deed becomes effective from the date of its registration and the vendee is a purchaser with notice.

3. **Evidence—Interest in Suit—Harmless Error.**

The son claiming title to lands under a deed from his father registered subsequently to the filing of a complaint operating as a *lis pendens*, in an action involving the title of his father, was asked on examination if he was willing to stand or fall with his father in the suit: *Held*, the question was competent as tending to show his interest, but was rendered immaterial by his answer, "I don't know whether I understand you."

4. **Wills—Estates for Life—Remaindermen—Purchaser with Knowledge—Evidence—Cutting Timber.**

The devisees of the remainder of personalty brought suit against the vendee of the life tenant, alleging and introducing evidence tending to show that the lands in controversy were bought with moneys in which the grantor had only a life interest under the will; and, also, that the vendee, in consideration of his deed, had agreed to move on the land and support the vendor, the life tenant, during her life, with knowledge of her life estate therein: *Held*, competent for the plaintiff to prove that the defendant had cut and removed a large part of the timber on the land as tending to show that he knew he had no just claim on the land in fee, and was taking advantage of everything he could before being called upon to account.

5. **Instructions — Estates for Life — Property Consumed in Use — Lands.**

An instruction upon the principle that a life tenant has the right to property the use of which naturally consumes it, has no application to this case wherein the money had been invested in lands, and the cutting of timber was the matter involved.

6. **Estates for Life—Personalty—Takers in Succession—Investments —Interest—Specific Bequests—Executors and Administrators.**

When the beneficiaries of a residuary bequest of personal property are to enjoy it in succession, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder; but when the bequest is specific and is not of the residue, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman.

APPEAL from *Long, J.*, at July Term, 1911, of MCDOWELL.

This is an action brought by the legatees of John Simmons, deceased, for the recovery of land alleged to have been purchased with money which the said Simmons bequeathed to his wife, Jane Simmons, for life, with remainder to the legatees named in his will.

The plaintiffs offered evidence tending to show that the money with which the land in question was purchased was money belonging to the estate of John Simmons, deceased, and bequeathed by him to his wife, Jane Simmons, for life, with remainder to the legatees named in his will, and tending also to show that the defendant took title to the land in controversy under a contract and deed from Jane Simmons, in consideration of an obligation upon the part of the defendant, Thomas Fleming, to maintain and support the said Jane Simmons at his home so long as she should desire to stay there, with knowledge at the time of the taking of such deed that the land was purchased with money belonging to the estate of the said John Simmons.

The land bought with the money was conveyed to Jane Simmons, and she afterwards conveyed the same to the defendant.

In the will of John Simmons, the testator bequeaths and devises all his "personal and real property, money, notes, and accounts, etc.," to his wife, Jane Simmons, to have full control, use, and benefit of it during her life, and at her death to the plaintiffs, and it is provided therein that none of the real estate or personal property be sold or transferred until after the death of his wife.

The defendant has executed a deed to his son, conveying the land to him, but it was not registered until after the complaint in this action was filed.

The jury returned a verdict in favor of the plaintiffs, and from a judgment thereon the defendant appealed.

Pless & Winborne for plaintiff.
James Morris and W. T. Morgan for defendant.

ALLEN, J. The controversy between the plaintiffs and defendant is almost entirely one of fact, and the jury has found adversely to the defendant.

The defendant, who was 79 years of age, was examined as a witness, and upon cross-examination made confusing and contradictory statements as to the time when he executed the deed to his son.

The defendant then offered the deed to the son for the purpose of showing its date, and upon objection it was excluded.

The date of the deed was an immaterial inquiry, as it was admitted that it was registered after the filing of the complaint in this action.

In *Collingwood v. Brown,* 106 N. C., 364, it is held that in actions to recover land the filing of the complaint, in which the property is described and the purpose of the action stated, operates as a *lis pendens,* and that as against the plaintiffs the title of a purchaser from the defendant begins from the date of the registration of his deed.

If, however, the date of the deed was material, the defendant had the full benefit of the evidence.

The son of the defendant was a witness and testified that the deed was made 23 July, 1909, and there was no evidence to the contrary.

The question asked this witness on cross-examination, as to whether he was willing to stand or fall with his father in the suit, was for the purpose of showing his interest, but in any event his answer, "I don't know whether I understand you," could not have affected the verdict.

The defendant offered evidence to show that the land was bought with the money of Jane Simmons, and that she made the deed to him in consideration of his promise to support her, and that he had complied with his agreement.

In reply, the plaintiffs were permitted to prove, over the objection of the defendant, that he had cut the larger part of the timber on the land.

No damages were recovered, but we think the evidence competent as a circumstance corroborative of the evidence of the plaintiff that the defendant accepted his deed with knowledge that the land had been bought with the money of the testator.

If he was stripping the land of its timber, it might well be argued that he was doing so because he knew he had no just claim, and that he might make what he could, before being held to account.

The remaining exception is to the modification of the following instruction by striking out the word "money." "Property, the use of which naturally consumes it, such, for instance, as wine, corn, sheep, cattle, and money, when conveyed by will to the use of one for life, passes to the life tenant the right to consume such property absolutely."

If the instruction contained a correct statement of the law, it had no application to the evidence, which did not tend to prove that the money had been consumed, but that it had been invested in the land.

The rule seems to be that, whenever personal property is given, in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is that the persons indicated are to enjoy the same in succession; and in order to give effect to its interpretation, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder (*Ritch v. Morris*, 78 N. C., 377), but when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman. *Britt v. Smith,* 86 N. C., 308.

We conclude that there is

No error.

JOHN P. ARTHUR v. PHILIP S. HENRY ET AL.

(Filed 20 December, 1911.)

1. **Contracts—Independent Contractor—Dangerous Work—Owner's Liability—Respondeat Superior.**

The owner or proprietor of work necessarily and inherently dangerous in its performance, as in this case blasting rock in the corporate limits of a town near the homes of the plaintiff and several others, and which to the knowledge of the defendant had caused rocks to be thrown upon plaintiff's dwelling and rocks and dirt upon his premises, with loud explosions and great force, cannot, by contract with another creating the relationship of independent contractor, escape liability from the damaging consequences of the work done thereunder. *Hunter v. R. R.,* 152 N. C., 688, cited and applied.

2. **Master and Tenant—Evidence—Nonsuit.**

Where in the defense to an action for damages for a personal injury the relationship of independent contractor is unsuccessfully relied on by the owner or proprietor, the evidence tending to show that the damages sought were caused by the negligent act of the independent contractor will be considered on motion to nonsuit in the same view as that of the owner and proprietor, and when there is conflicting evidence as to the negligent act, the court may not pass upon the credibility of witnesses, but must leave the question for the determination of the jury.

3. **Same.**

The evidence in this case is sufficient of an agent's negligence for which his principal is responsible in damages caused by blasting near the residence of the plaintiff in an incorporated town, which tends to show that for smothering the blasts six small pine logs were used, that stones were showered on plaintiff's premises, falling around the house in which he and his sister lived, one of the stones "as large as an ordinary letter box" falling beyond the house, and shattering a limb of a tree in front of it, others falling on sheds on the premises and likewise destroying plaintiff's grapevines and fruit trees.

4. Master and Servant—Dangerous Work—Wantonness and Recklessness—Punitive Damages—Respondeat Superior.

When there is evidence that the defendant negligently caused damages to the plaintiff's property from blasting near it, punitive damages are recoverable when it is shown that the defendant evinced a reckless indifference to the rights of the plaintiff, and that the acts complained of were wantonly done, or from a bad motive.

5. Same—Evidence.

The plaintiff may recover punitive damages caused to his premises by the negligent blasting of rock by the defendant nearby, when it is shown that the defendant had unsuccessfully attempted to buy the plaintiff's property, and thereafter, upon complaint of the blasting, had promised to correct the trouble; that he had endeavored to secure the services of the plaintiff to draw contracts for him with other owners of property similarly situated, so that he might escape liability from his blasting operations by lease to insolvent persons, declaring he was going to operate a power-house all night under plaintiff's threat of indictment; further saying he would find a way without incurring liability, which resulted in his attempting to carry out his purpose by entering into a contract for the continued work to be done by an independent contractor, without regard to the care which should be taken by him, but with provision that the defendant should be saved harmless from liability; that the operations of blasting under the contract were more damaging than theretofore.

6. Same—Notice.

When there is evidence of recklessness and wantonness on the part of defendant's lessee which caused damage to plaintiff's property located near, a conversation between the parties to the effect that a rock had fallen from a blast on the plaintiff's house previously, is competent as tending to fix the defendant with notice of the danger to plaintiff's property at the time of his making the lease set up in defense to avoid liability, there being evidence that the lease was made in order that the defendant might continue to have the blasting done and thus make the defense available to him.

7. **Punitive Damages—Financial Condition—Measure of Damages—Evidence.**

When punitive damages may be awarded, evidence of the defendant's financial condition is admissible in behalf of the plaintiff.

8. **Measure of Damages—Dangerous Work—Consult—Negligence—Due Care—Questions for Jury.**

In plaintiff's action for damages to his property for the negligent blasting operations of the defendant, there was conflicting evidence as to whether the plaintiff gave the defendant his consent, and thereafter notified him to desist: *Held*, in this case, that the consent did not imply that the blasting should be done with threatened injury to life and property, and it was for the jury to determine, upon their finding that the consent was given, whether the defendant continued to blast after notice to desist, and whether the defendant continued to blast in a negligent or obviously dangerous manner, such as was inconsistent with due care, or whether from the operations there was no other or further injury to plaintiff's property than was necessarily involved in the operation of the quarry.

9. **Measure of Damages—Retraxit—Consideration—Evidence—Limitation of Actions.**

When, with competent evidence, the plaintiff has established his right to recover damages to his property caused by the negligent blasting of rock by the defendant, his statement on the witness stand that he asks no damages prior to a certain date within the statutory time, is not *a retraxit* and is without consideration, and does not bar him of his right to recover all the damages he is entitled to not barred by the statute of limitation pleaded by the defendant.

10. **Issues—Pleadings—Appeal and Error.**

When the issues submitted arise from the pleadings and present all the contentions of the parties it will not be held as reversible error on appeal for the court to refuse to submit other issues.

11. **Limitations of Actions—Absence from State—Computation of Time—Interpretation of Statutes.**

The absence of a defendant from the State for more than one year is excluded from the computation of time for the running of the three-year statute pleaded in bar. Revisal, sec. 366.

12. **Instructions—Requests—Defined—Damages Claimed—Harmless Error.**

The refusal by the trial judge to give a special prayer for instruction requested, excluding from their consideration damages to the health or person of the plaintiff, is not held for reversible error in an action for damages to his property caused by the negligent blasting of rock by the defendant near it, when the judge confines the recovery to injury to property, though as a cautionary measure it might have been given with propriety.

APPEAL from *Carter, J.*, at May Term, 1911, of BUNCOMBE.

This action was brought by the plaintiff against the defendant to recover damages alleged to have been sustained by the plaintiff on account of the operation of a stone quarry by the defendant Philip S. Henry, on land belonging to the defendant and adjoining plaintiff's land. An injunction was sought in the case against all the defendants, but damages claimed only as against the defendant Philip S. Henry. The plaintiff claimed that the defendant had operated his quarry, which was within a few feet of the line between plaintiff and defendant, and about 400 feet from the plaintiff's house, in a negligent, careless, and reckless manner, and had thrown stones, dirt, dust, and other substances on the plaintiff's premises; had killed and destroyed his fruit trees, shade trees, herbs, and grass; had thrown stones and dirt and dust into and on the plaintiff's house, and had, by means of the noise caused in the operation of said stone quarry and in operation of a stone crusher as a part thereof, created a nuisance and seriously damaged his property. The plaintiff also claimed that the defendant had made a lease of his stone quarry for the purpose of avoiding liability for damages to the plaintiff, and that the lessee, Faragher Engineering Company, operated said quarry in a negligent, careless, and reckless manner, damaging his property; and further, that all of these acts were done by the defendant willfully and wantonly and committed for the purpose of injuring the plaintiff, and with the knowledge that said action would injure the plaintiff and his property.

The quarrying was begun in May or June, 1904, and blasting was necessary and resorted to, and in the progress of the work stones were thrown upon the plaintiff's land and on his house.

The defendant carried on his operations from June, 1904, to some time in October, 1906. The evidence of the plaintiff himself shows that he had no personal knowledge as to the date of the commencement of these operations, being away from home at the time; that on his return he found that a rock had been thrown onto the roof of his house, injuring it, requiring an expense of $1.50 for repairs, which defendant paid. Upon the throwing of the stone on the house appellant ceased his operations and did not resume until plaintiff consented he might. No stones were ever thrown upon the house after the first one, but were thrown in his yard. The plaintiff was never at home when the blasting was going on, but at his office in the First National Bank Building, and Library Building, but could hear the explosions. He made no claim for the injury done the house, and makes none in this action, and said on his examination that he did not claim damages prior to 4 August, 1906.

In July, 1906, the attorney in fact of appellant leased the quarries to a corporation called Faragher Engineering Company, and this company began operating the quarries about August or September afterwards, and continued until March or April, 1907.

There was evidence showing that the plaintiff owned a lot of land in the city of Asheville, consisting of several acres, where he resided with his sister, both being unmarried; that defendant purchased a tract of land adjoining the plaintiff's, and that the defendant's land was situated south and east of the plaintiff's land on the side of the Town Mountain in the corporate limits of Asheville; that the defendant's land lay considerably above the plaintiff's land, and that in 1904 the defendant opened up a stone quarry on his land at a point about 30 or 40 feet from the plaintiff's line, and about 400 feet from the plaintiff's house, but at an elevation of 50 to 100 feet above the plaintiff's residence; that this stone quarry was operated by means of blasting, and that a stone crusher was operated at the quarry, where the stone was crushed into dust and small pieces of stone, which stone crusher was run by steam power. The evidence tended to show that, beginning in 1904, the defendant had in person operated the quarry from time to time, and that while he so operated it the plaintiff's lands were damaged, as alleged by the plaintiff; that in June and September, 1905, February, 1906, the defendant told the plaintiff that he wanted an agreement drawn whereby the quarry could be operated without liability on his part, and proposed to make some arrangement with insolvent persons to conduct the quarry, and after considerable talk about the matter there were some bitter words between the parties, the defendant saying, "I will find a way to use that quarry without being liable." That in July, 1906, the defendant leased the quarry to the Faragher Engineering Company, to whom defendant had promised to lease it, before he left for Europe. In this lease defendant retained the right to have a representative at the quarries to measure the stone removed, and had the lessee to agree to indemnify him against all claims and actions for damages, but did not retain the right to supervise the proper and safe operation of those quarries, or require the lessee to agree to conduct them safely.

Operations in the mine again began in 1909.

There was also evidence that the defendant knew the injurious character of the operations at the quarry; that he knew the operations were calculated to injure the plaintiff; that he had endeavored to get the plaintiff to draw a contract whereby he would be released from liability; had endeavored to get him to act as his attorney and adviser; had proposed to lease the quarry to insolvent persons for the purpose of being relieved of liability, and finally had told the plaintiff that he would find a way to operate the quarry without liability; and that he leased the quarry to the Faragher Engineering Company.

The defendant was absent from the State from May, 1906, to October, 1907.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, upon the ground that the operation of the mine up to the time the Faragher Company began work was with the consent of the plaintiff, and that the defendant was not responsible for the acts of Faragher Company, which was overruled, and the defendant excepted.

The defendant tendered the following issues, which his Honor declined to submit, and the defendant excepted:

1. Was the plaintiff's property injured by the willful and wanton acts and negligence of the defendant prior to 4 August, 1906, as alleged in the complaint?

2. If so, what actual damages is plaintiff entitled to recover?

3. Is plaintiff entitled to recover punitive damages on account of said willful and wanton acts and negligence, and if so, how much?

4. Was the cause of action, if any, of plaintiff against defendant prior to August, 1906, barred by the statute of limitations at the date of the commencement of this action?

5. Was plaintiff's property injured by the willful and wanton acts and negligence of the Faragher Engineering Company, as alleged in the complaint, after 4 August, 1906?

6. Is the defendant liable to plaintiff for the willful and wanton acts and negligence of the Faragher Engineering Company, as alleged in the complaint?

7. If so, what actual damage is plaintiff entitled to recover?

8. Is plaintiff entitled to recover from the defendant punitive damages on account of the willful and wanton acts of the Faragher Engineering Company, alleged in the complaint?

9. If so, how much?

The court adopted the following issues, to which defendant excepted:

1. Was the plaintiff, John P. Arthur, damaged by the negligent, wrongful, and unlawful acts of the defendant Philip S. Henry, as alleged in the complaint?

2. What amount of damages by way of compensation for such acts committed after 4 March, 1905, if any, is the plaintiff entitled to recover?

3. Were such acts done by the defendant wantonly and willfully and in reckless and wanton disregard of the plaintiff's rights?

4. What amount of punitive damages, if any, is the plaintiff entitled to recover for such acts committed after 4 March?

The defendant requested the court to instruct the jury as follows, which request the court refused, except as stated:

1. There is no evidence in the case to justify the awarding by the jury of punitive or exemplary damages for any of the alleged acts of the defendant committed prior to 4 August, 1906.

2. Punitive or exemplary damages cannot be recovered by plaintiff against defendant for any acts of the Faragher Engineering Company, alleged in the complaint.

3. There is no evidence in the case of malice or wantonness toward plaintiff on the part of the defendant.

4. There is no evidence in the case that any of the alleged acts of the defendant were willful.

5. There is no evidence in the case to fix any liability upon defendant for any of the acts alleged against the Faragher Engineering Company, or for damages or injuries done defendant by said company.

6. If the jury shall find from the evidence in the case that the defendant conducted his blasting operations with the consent of the plaintiff, the plaintiff cannot recover damages against the defendant.

7. If the jury shall find from the evidence in the case that plaintiff from time to time in the progress of the quarrying operations of defendant, alleged in the complaint, requested defendant to continue his work and not to stop on his (plaintiff's) account, and defendant did continue until notified by plaintiff to desist and cease to carry on said operations, and the defendant, upon receipt of such notice, did desist and cease, the plaintiff cannot recover damages on account of injuries to his property resulting from said operations.

The court modified this instruction by adding thereto the following:

"Provided due care was exercised in the conduct of such operations." As modified, the said instruction was given.

8. That the cause of action of plaintiff for damage and injury to the plaintiff's trees and shrubbery, if any was done by the defendant, was barred by the statute of limitations when this action was begun.

9. There is no evidence that the plaintiff sustained any personal injury or injury to his health by any operations of defendant or his lessee.

There are also exceptions to evidence and to parts of the charge.

The jury answered all the issues in favor of the plaintiff, and from a judgment thereon, the defendant appealed.

Locke Craig, Jones & Williams, and Martin & Wright for plaintiff.

James H. Merrimon and J. G. Merrimon for defendant.

ALLEN, J. There are forty-three exceptions in the record, all of which may be considered under the following propositions:

(1) Is there evidence which justified submitting the case to the jury?

(2) Is there evidence upon which the defendant can be held liable for the acts of Faragher Company?

(3) Is there any evidence of wanton or malicious conduct on the part of the defendant which will support an award of punitive damages?

(4) Did the plaintiff consent to the operations of the defendant, and if so, does such consent absolve him from liability?

(5) Does the evidence of the plaintiff that he claimed no damages prior to August, 1906, prevent a recovery of other damages, not barred by the statute of limitations?

(6) Is there error in refusing the issues tendered by the defendant, or in submitting those passed on by the jury?

(7) Is the plaintiff's cause of action or any part thereof barred by the statute of limitations?

Eliminating for the present the effect of consent by the plaintiff to the operations of the defendant, and also the plea of the statute of limitations, it is well to consider the first three propositions together, as much of the evidence bears on all of them, and it is also advisable to determine in the outset how far, if at all, the defendant is liable for the conduct of the Faragher Company.

It is in evidence that, prior to the lease to the Faragher Company, the defendant had been operating his quarry, and that blasting was necessary in the work he was doing; that he had thrown stones on the premises of the plaintiff; that complaint had been made and he had been told of the danger to the plaintiff, and that the lease to the Faragher Company was for the purpose of having these operations continued.

It is also in evidence that the quarry was within the corporate limits of the city of Asheville, and that there were several homes, including that of the plaintiff, near to it.

This evidence, if accepted by the jury, brings the case within the doctrine of *Hunter v. R. R.,* 152 N. C., 688, in which the defendant began blasting on its right of way for a lawful purpose, and after notice of danger to the plaintiff entered into an agreement with another to do the work in the same way, under a contract which, by its terms, would establish the relation of independent contractor, and it was held that the defendant was liable for the acts of the contractor.

In *Thomas v. Lumber Co.,* 153 N. C., 358, *Justice Manning* reviews the cases holding that one cannot escape liability by entering into an independent contract, if the work to be done is intrinsically dangerous, and says, with reference to the *Hunter case, supra:* "In *Hunter's case* this Court ruled that the work there handed over to the independent contractor to be done, to wit, blasting of rock, fell within the established exception to the rule of nonliability, by reason of its dangerous character."

These decisions were the result of the unanimous opinion of the Court, and on their authority we must hold that the work to be done was of such character that the defendant could not protect himself by the lease he made, and that he is liable for the acts of the Faragher Company in the prosecution of the work.

If so, all the evidence as to the operation of the quarry may be considered in determining whether there was sufficient evidence to be submitted to the jury.

The plaintiff was entitled to recover damages, if the defendant threw stones upon his land without his consent, and if he consented to the use of the quarry, he could also recover if the work was negligently done.

As we are not now considering the effect of consent on the part of the plaintiff, the question then arises, Was there evidence of negligence on the part of the defendant or Faragher Company?

There was evidence that by the use of proper precautions there would be no danger to the plaintiff's property, and that persons 400 or 500 yards away would not be disturbed by the noises more than by ordinary traffic.

There was also evidence that the precautions used were not sufficient; that the defendant used for smothering the blasts six small pine logs; that stones were showered on the premises of the plaintiff, and fell around the house the plaintiff and his sister were living in; that one stone as large as an ordinary letter box came over the house and shattered the limbs of a tree in front of the house; that stones fell on the sheds on the premises, and that grapevines and fruit trees were destroyed. There was also evidence that one of the blasters employed at the quarry was reckless, and that another said just before a blast that he was going to shell the town, and that when he fired the blast rocks and stones flew everywhere. This was, in our opinion, ample evidence of negligence.

There was much evidence to the contrary, tending to prove that diligence was exercised by the defendant and that he was careful to avoid injury to the plaintiff, but it is not within our province to pass on the credibility of the witnesses.

If there was evidence of negligence for the consideration of the jury, was there any view of the case in which the question of punitive damages could be submitted to them?

If there was evidence that the acts of the defendant evinced a reckless indifference to the rights of the plaintiff, that they were done wantonly, or from a bad motive, punitive damages could be awarded.

There was evidence that the defendant knew that the operation of the quarry was dangerous, and that it was injurious to the property of the plaintiff; that he had tried to buy the plaintiff's property; that complaints had been made to him from time to time and that he had promised to correct the trouble; that he had endeavored to secure the services of the plaintiff to draw a contract for him with other persons, by which he would escape liability; that he had proposed to lease the quarry to insolvent persons for this purpose; that he had threatened the plaintiff, saying he was going to operate a power-house all night; that the plaintiff told him that he would have him indicted, and that he replied that he would find a way by which he could use the quarry without incurring any liability to the plaintiff; that within a few months he leased the quarry to the Faragher Company for the purpose of having it operated, in which lease there was no stipulation for prudent management, or that any precautions should be taken to protect the property of the plaintiff, but it was provided therein that said company would save the defendant harmless from any and all actions or claims for damages of all kinds, character, or description caused by any operations, conduct, or work in, at, and upon the said quarries, by, through, and with its servants, agents, and employeés, and would prosecute any and all actions necessary for the full, complete, and ample protection of the defendant against such claims, and that while the quarry was operated by the Faragher Company conditions were worse than before.

There was also evidence on the part of the defendant directly contradicting the evidence of the plaintiff, and tending to prove that he had treated the plaintiff at all times with neighborly consideration; that he had always discontinued the operations when the plaintiff asked him to do so; that he never resumed the operation of the quarry unless requested to do so by the plaintiff; that he made the lease to the Faragher Engineering Company in good faith and for the purpose of carrying out works of public improvement; that the Faragher Engineering Company was capable of carrying on these operations in an inoffensive manner; that Mr. Odell, the engineer of the Faragher Engineering Company, was an engineer of ability and knew how to carry on these operations without offense, and that it would be contrary to all the intercourse between the plaintiff and the defendant to find that the defendant had been actuated by the sinister motive of wishing to injure the plaintiff by this lease.

These were matters for the jury and at least furnished some evidence that the defendant was recklessly indifferent to the rights of the plaintiff.

If there was evidence of negligence and wantonness on the part of the Faragher Company, the conversation of the plaintiff with the defendant in 1904, as to the operation of a quarry near him, the letter of 16 February, 1906, and the rock which fell on the house of the plaintiff in 1904, were competent as tending to fix the defendant with notice of the danger to the plaintiff's property at the time of the lease to the Faragher Company, and whenever punitive damages may be awarded, evidence of the financial condition of the defendant is admissible in behalf of the plaintiff (*Tucker v. Winders,* 130 N. C., 147), and his Honor carefully restricted the evidence to these purposes.

This brings us to the consideration of the evidence tending to show consent on the part of the plaintiff, and it must be remembered that the defendant has at all times denied that there was negligence in the operation of the quarry, and that his contention is that the plaintiff consented for him to work the quarry, and not for him to work it negligently.

There is evidence of such consent, but it is coupled with the condition that the quarry must not threaten injury to life or property, and the question was properly submitted to the jury, as follows: "If the jury shall find from the evidence in the case that the plaintiff, from time to time in the progress of the quarrying operations of defendant alleged in the complaint, requested defendant to continue his work and not to stop on his (plaintiff's) account, and defendant did continue until notified by the plaintiff to desist and cease to carry on said operations, and the defendant, upon the receipt of such notice, did desist and cease, the plaintiff cannot recover damages on account of injuries to his property resulting from said operations, provided due care was exercised in the conduct of such operations; but a request of the plaintiff to the defendant not to cease and discontinue his work on those premises will not be construed by the law to authorize the defendant to conduct these operations in a negligent or in an obviously dangerous manner; and if you find from the evidence that the operations of the defendant in this quarry, and this stone crusher, during the period covered by your inquiry, were at the instance and express suggestion of the plaintiff, and you further find that these operations were conducted with due care, and that there was no other or further injury to the property of the plaintiff than was necessarily involved in the operation of the quarry, then the plaintiff would not be entitled to recover. But if you find that the operations were negligently carried on, and that unnecessary injury was done to the property of the plaintiff, the fact of the plaintiff's request or suggestion would not deprive him of the right to recover here."

Nor did the statement of the plaintiff on the witness stand, that he claimed no damages prior to 4 August, 1906, prevent an inquiry as to all damages not barred by the statute of limitations.

It is a statement which ought to have had weight with the jury, but it does not amount to a *retraxit,* and as a contract there is no mutuality and no consideration.

The issues adopted by the court were sufficient to present all the contentions of the parties, and they arose on the pleadings, and when this is true, the refusal to submit other issues is not error.

Nor do we find any error as to the statute of limitations.

The action was commenced on 4 August, 1909, and it was admitted that the defendant was absent from the State continuously for seventeen months, from 22 May, 1906, and his Honor told the jury they could not award damages for acts done prior to three years before the commencement of the action, excluding from the computation the time the defendant was absent from the State, which is in accord with the statute. Revisal, sec. 366.

His Honor might with propriety have given the ninth prayer for instruction as a cautionary measure, but he was not compelled to do so, as there was no evidence of injury to the health or person of the plaintiff, and there is no suggestion in the record that he claimed damages on that account, and the charge permits no recovery except for injury to property.

We have examined the record with care, and have considered all the exceptions, and find

No error.

SHERMAN PATTERSON v. JAMES J. NICHOLS.

(Filed 20 December, 1911.)

1. **Employer and Employees—Safe Place to Work—Negligence—Evidence.**

   In an action for damages for personal injury received by the employee, evidence that the cause of the injury was due to the failure of the employer to furnish him a reasonably safe place in which to do the work assigned to him, or proper appliances for the purpose, is evidence of actionable negligence.

2. Same—Machinery.

In an action by the employee for damages for a personal injury received from the alleged negligent failure of the employer to provide him a safe place in which to work, there was evidence tending to show that the employee had fixed a certain piece of shafting suspended about 10 feet from the floor, which required the stopping of a part of the machinery, by throwing off the belt; that there was no "shifter" for this purpose, and to start this part of the machinery in motion again the servant had to mount a ladder placed against the wall in a space of 2 feet between the shaft and the wall, with his back to a projecting set-screw, which should have been counter-sunk, and reach over the pulley to put the belt back on while the other machinery was in motion; that while so doing, with his back necessarily towards the revolving shafting and projecting set-screw, the latter caught him in the collar of his overalls and threw him, to his injury: *Held*, evidence sufficient to take the case to the jury.

3. Master and Servant—Safe Place to Work—Contributory Negligence—Evidence.

When there is sufficient evidence tending to show the employer's negligence in not providing his employee a safe place in which to fix certain shafting run by steam power, causing him to be injured, while placing a belt upon a machine at the top of a stepladder provided for the purpose, the jury, before answering the issue as to contributory negligence in the affirmative, must be satisfied by the greater weight of the evidence that the plaintiff knew of the danger which he was incurring or in the exercise of reasonable care should have known it; and that the work was so obviously dangerous that a man of reasonable prudence would not have engaged in it; or that in its performance he did not exercise reasonable care for his own safety.

4. Inconsistent Instructions—Appeal and Error.

An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is reversible error.

5. Safe Appliances—Approved and in General Use—Causa Causans—Evidence.

The plaintiff, while engaged in placing a belt upon a pulley to run certain machines in a laundry, was injured by the collar of his overalls catching on a projecting set-screw on a revolving shaft, 10 feet from the floor, while he was standing upon a stepladder, and there was evidence tending to show that the master had failed to provide a "shifter" which was approved and in general use for the purpose of shifting belts: *Held*, in the absence of evidence tending to show that it was practical to use the "shifter" under the circumstances of this case, and the evidence tending to show that the work being done was unusual in the employee's employment, an instruction was erroneous which involved the application of the principle that the employer should furnish appliances approved and in general use,

6. **Issues—Negligence—Several Acts—Instructions.**

When in an action for damages alleged by reason of defendants' negligence in inflicting a personal injury on the plaintiff, several acts of negligence are relied on and there is evidence to support them, it is proper for the trial judge to submit separate charges as to each, presenting the contentions of the plaintiff, upon which the issue of negligence may be answered in the affirmative, and to tell the jury that if they do not find the facts as contended, that the defendant would not be negligent in that respect.

APPEAL from *Lane, J.*, at September Term, 1911, of BUNCOMBE.

This is an action to recover damages for personal injury.

On 6 March, 1909, the plaintiff, who had been employed in the washroom of the defendant's laundry for four years, was engaged by the defendant as repair man, repairing defendant's machinery. He had been at this work about two weeks, when he was directed to extend a shaft so that another machine might be put in. In order to extend the shaft, it was necessary for the plaintiff to stop that part of the machinery, and that was done by throwing off the belt which connected it with the main shaft. This belt was usually thrown with a pole, but was put on by hand.

The shaft which was being extended was suspended from the ceiling. It was about 10 or 12 feet from the floor and 2 feet from the wall. Where the end went into the hangers there was a collar, which was kept tight by a set-screw which projected below the shaft about 4 inches. The set-screw was close to the hanger and 12 or 14 inches away from the pulley on which the belt ran. After the plaintiff had made the extension, he undertook to put the belt on to see whether the shaft would run right. For the purpose of getting to the shaft to put the belt on the pulley, there was provided a ladder with hooks on it so that it could be hung over the shaft. And when used in this way, a person putting on the belt would be working with his face towards the shafting and the set-screw. The plaintiff, instead of hanging the ladder over the shafting, leaned it against the wall, on the side of the pulley where the set-screw was, so that in climbing up he had his back to the shaft and the screw, and a space of about 2 feet between the shaft and the wall in which to work.

As the plaintiff was climbing the ladder, and reaching over to pull the belt on the pulley, the set-screw caught in the back of the collar of his overalls, and he was thrown around the revolving shaft and injured.

There was evidence that the hooks on the ladder were for the purpose of hanging over the shaft, to oil the machinery when not in motion, and that in the performance of the duty imposed on the plaintiff it was necessary to rest the ladder against the wall.

There was no evidence of any defect in the ladder. No shifter was used by the defendant, and there was no evidence that a shifter was in general use for putting on and off belts at pulleys located as was the one at which the plaintiff was injured, or elsewhere.

There was evidence that in modern laundries the set-screw is counter-sunk, and not permitted to project from the collar.

The following verdict was returned by the jury:

1. Was the plaintiff injured by the negligence of the defendant Nichols, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury? Answer: No.

3. What damage, if any, has the plaintiff sustained? Answer: $2,000.

His Honor charged the jury on the first issue as follows, omitting his statement of the contentions of the parties:

"In order for the plaintiff to recover in this action, he must satisfy you by the preponderance or greater weight of the evidence, first, that this defendant was negligent, as alleged, and the plaintiff must satisfy you that he was injured, and that the negligence of the defendant was the proximate cause of his injury. If he fails to satisfy you in any one of these propositions, then he would not be entitled to recover.

"Now, what is negligence? Negligence is the failure to exercise such care, prudence, and caution, under all of the circumstances surrounding the situation, as an ordinarily careful, prudent, and cautious man would be expected to use and exercise under the circumstances. It is the failure to exercise such care and the failure to do something that an ordinarily careful, prudent, and cautious man would be expected to do under the circumstances, or it is the doing of something that an ordinarily cautious, careful, and prudent man would not be expected to do under all the circumstances that existed, surrounding the case. So it is the failure to use proper care under the circumstances, by the doing or the omission of some act that a reasonably prudent, careful, and cautious man would be expected to do.

"If the jury find by the greater weight of the evidence that the defendant, James J. Nichols, provided for the plaintiff a ladder to stand on while putting on the belt; that the putting on of this belt was a part of the duty of the plaintiff while engaged in the service of the defendant; that this ladder was the only appliance furnished by the defendant upon which to stand while putting on the belt, and that the ladder was a reasonably safe appliance to use for the purpose of putting on the belt; that it was necessary for him to use the ladder while in the performance of his duty; and that the defendant was negligent in not supplying the plaintiff with a safer appliance on which to stand while in the performance of his duty, and that such negligence was the proximate cause of the injury to the plaintiff, the jury will answer the first issue 'Yes.'

"If the jury find by the greater weight of the evidence that the defendant, James J. Nichols, did not equip his plant at the place where the plaintiff was changing the belt with a shifter and idler; that such shifter and idler would have been a safe appliance and suitable for the purpose of changing the belt; that the putting on and off of the belt without such shifter and idler was dangerous and uselessly dangerous to the plaintiff; that it was uselessly dangerous to require the plaintiff to put on and off this belt with a stick while standing on a ladder; that the defendant was negligent in not supplying his plant at this place with a shifter and idler, and that such negligence was the proximate cause of the injury to the plaintiff, the jury will answer the first issue 'Yes.'

"But if you find that the defendant did provide proper appliances for the purpose of putting on and taking off this belt, and that the stick provided there for taking off the belt was a suitable and reasonably safe appliance for taking it off, and such as was in general use in plants and places of this kind for removing belts, and that the belt could have been put on by the use of this ladder in a proper manner, by standing it at the proper place, as the defendant contends, by pushing on the belt, that that was a reasonably safe and suitable way and appliance there for putting on and taking off the belt, then you would answer the first issue of negligence 'No'; otherwise you would answer it 'Yes.'

"Now, if you find by the greater weight of the evidence that there was a set-screw projecting about an inch from one of the shafts; that it was necessary for the plaintiff in the discharge of his duty to work in close proximity to this set-screw; that had the set-screw been counter-sunk, as described by the witness, it would not have been dangerous; that in the exercise of reasonable care it was the duty of the defendant to counter-sink this set-screw; that it was dangerous for the plaintiff to perform his duty as he was required to perform it while this set-screw was projecting from the shaft, as described by the witness, and that it was negligent in the defendant to require the plaintiff to work in close proximity to the projecting set-screw, and that such negligence was the proximate cause of the injury to the plaintiff, the jury will answer the first issue 'Yes.'

"I charge you further, gentlemen of the jury, that the law did not require the defendant to do more than to exercise reasonable care to provide reasonably safe machinery and appliances, and the defendant was not required to adopt the latest appliances or machinery, but only to use that which was in general use in places of like kind and character. And if the jury shall find from the evidence that shafting with projecting set-screws was in general use in steam laundries of the kind and character the defendant was operating, the use of shafting with a projecting set-screw by the defendant would not be negligence, and the jury should answer the first issue 'No.'

"The defendant Nichols was not required to use a shaft with a sunken set-screw merely because such shafts were put upon the market and were being used and approved by others, and if the jury shall find from the evidence that machinery such as was being used by the defendant was in general use in other laundries, the use of such machinery with a projecting set-screw would not be negligence, and the jury should answer the first issue 'No.'

"That if the jury shall find from the evidence that a shaft collar with a projecting screw such as was being used by the defendant Nichols was in common use, and that the shaft which he was using was of the kind that was being used in other laundries, the use of a shaft with a projecting screw would not constitute negligence on the part of the defendant, and the jury should answer the first issue 'No.' "

The defendant excepted to the different parts of the charge instructing the jury how the issue should be answered.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was overruled, and the defendant excepted.

There was a judgment upon the verdict, and the defendant appealed.

Philip C. Cocke for plaintiff.
A. S. Barnard for defendant.

ALLEN, J. The motion for judgment of nonsuit was properly overruled.

There was evidence for the consideration of the jury that the place where the plaintiff was required to perform his duty was not, under all the circumstances, reasonably safe, and that this was the cause of the plaintiff's injury, and if so, there was evidence of negligence.

The absence of a shifter, the presence of a projecting set-screw, the fact that a ladder had to be used, that the ladder had to be set against the wall, that the plaintiff had to go up the ladder in a space of 2 feet between the shaft and the wall, with his back to the screw, and had to reach over the pulley to put on the belt while the machinery was in motion, are all circumstances, if found to exist, which enter into the question of a reasonably safe place.

We are also of opinion that his Honor correctly charged the jury on the second issue that, "Before you can answer the second issue 'Yes,' you must be satisfied by the greater weight of the evidence that the plaintiff knew the danger which he was incurring or in the exercise of reasonable care could have known it, and that the work required of him by the defendant was obviously so dangerous that a man of reasonable prudence would not have engaged in it, or that in the performance of his work he did not exercise reasonable care for his own safety. Unless the jury so find, that the plaintiff was negligent as herein stated, you will answer the second issue 'No,'" and that he could not, as a matter of law, direct the jury to answer the second issue "Yes."

We think, however, there is error in the instructions on the first issue which entitles the defendant to a new trial.

When the charge on the first issue is considered as a whole, there are inconsistent directions to the jury, which must have left them in doubt as to a correct finding upon the issue.

To illustrate: His Honor charged the jury to answer the first issue "Yes," if they found that the defendant was negligent in not supplying the plaintiff with a safer appliance on which to stand while in the performance of his duty, and to answer it "No" if they found that a collar with a projecting screw was in common use. Suppose the jury found both facts to exist, how should the issue be answered?

When several acts of negligence are relied on by the plaintiff and there is evidence to support them, it is proper to submit separate charges as to each, presenting the contentions of the plaintiff, upon which the issue of negligence may be answered in the affirmative, and telling the jury that if they do not find the facts as contended, that the defendant would not be negligent in that respect.

The charge upon the use of the ladder as a safety appliance is not free from doubt. If by proper construction it was intended to leave to the jury the question of a defect in the ladder, we would hold it erroneous, because no evidence of such defect was introduced; but we think a fair interpretation of the language leads to the conclusion that his Honor was speaking of the ladder as an appliance, and of its safety for the purpose for which it was being used.

We also think there was error in the charge as to the use of a shifter, upon the ground that there was no evidence to support it.

It is the duty of the employer, "where the machinery is more or less complicated, and more especially when driven by mechanical power, to provide for his employees, in the exercise of proper care, a reasonably safe place to work, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Witsell v. R. R.,* 120 N. C., 557; *Marks v. Cotton Mills,* 135 N. C., 287." *Hicks v. Manufacturing Co.,* 138 N. C., 326.

The rule is well stated by *Justice Walker* in *West v. Tanning Co.,* 154 N. C., 47: "The master does not guarantee the safety of his servant while engaged in the discharge of his duties. He is not an insurer, and is not bound to furnish him an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best-known machinery, implements, and appliances, but only such as are reasonably fit and safe and in general use. He meets the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment."

In determining whether the place is reasonably safe, evidence as to the appliances used is competent, but if shown to be such as are approved and in general use, may not be conclusive, and it may be that in the absence of evidence that shifters were in general use, circumstances might arise in which it would be proper to submit the question of negligence to the jury upon proof that no shifter was used, as in cases where the employee is working at the machine and is required constantly, in the performance of his duty, to shift the belt; but these conditions do not exist here.

The plaintiff was injured at a pulley 10 or 12 feet from the floor, and there is no evidence that it was practicable to use a shifter at a pulley so located, or that one had ever been used in any plant for any purpose, or that any employee of the defendant, except the plaintiff, had ever been required to touch the pulley, and the plaintiff does not show that he had done so, except when doing the work of extending the shaft, immediately before his injury.

In the absence of evidence, it was erroneous to submit this view of the case to the jury. *Burton v. Manufacturing Co.,* 132 N. C., 17; *Joines v. Johnson,* 133 N. C., 487; *Stewart v. Carpet Co.,* 138 N. C., 61.

There is also an exception to the charge on damages, which it is not necessary to consider; but we call attention to the fact that the rule as to the measure of damages stated in *Wallace v. R. R.,* 104 N. C., 451, is full and comprehensive, and that elements of damage embraced therein, as to which no evidence is offered, should be eliminated.

For the errors pointed out, there must be a new trial.

New trial.

JOSEPH L. MAY v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 6 December, 1911.)

1. **Trespass—Rightful Entry—Unlawful Acts.**

   A lawful right of entry upon the lands of another will not justify its being done in a violent and insulting manner, regardless of the rights of the owner in his occupancy.

2. **Same—Consequences of Acts—Knowledge—Direct Consequences —Measure of Damages.**

   The employees of a telegraph company entering upon the right of way of a railroad company in the construction or maintenance of its telegraph line, within the scope of their agency and in furtherance of the business of the telegraph company, may bind the company in damages to the owner by the violence of their entry, and the use of boisterous and profane language, the singing of lewd songs, and by the entrance into his dwelling and by acting in such a way as to cause injury to his wife from apprehension and mental shock; and evidence that she was in a delicate condition at the time, which aggravated the damage or rendered her more susceptible to the shock from the conduct described, may be considered by the jury in their award upon the issue as to the measure of damages, though the employees may not have been aware of it at the time complained of, when the tortious acts were the immediate, natural, and proximate cause of her injuries.

3. **Same—Torts.**

   When the tortious acts of the employees of a telegraph company, after rightfully entering on the lands of the owner, cause injury to the wife of the owner, it is not necessary that they should have contemplated the particular injury which their wrongful act produced, but the company is liable if the wrong was of such a character as to be injurious in its natural and proximate consequences.

4. **Trespass — Rightful Entry — Unlawful Acts—Evidence—Assault and Battery—Torts—Consequential Damages.**

   It is not necessary that the employees of a telegraph company entering rightfully upon the lands of the owner to perform their duties to their employer should actually commit an assault or a battery upon the owner or his family to make the employer liable for the consequent and proximate damages caused by their acts done in violence and in disregard of the owner's rights.

5. **Trespass—Torts—Mental Suffering—Damages.**

The tortious entry or trespass upon the lands of another supports a right of action for physical injuries resulting from a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, and it is not necessary that there must have been some direct physical injury in order to render the defendant's acts tortious, in a legal sense, and consequently actionable.

6. **Same—Parties—Owner—Injury to Wife—Recovery by Husband—Measure of Damages.**

The husband may recover in his own name in an action for damages done to his wife in consequence of an unlawful trespass of another for his separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife; and where the injuries are of a permanent nature a recovery by him may be had of such sum as will fairly compensate him for her future diminished capacity to labor, but excluding from the damages recoverable any mental suffering upon his part.

7. **Same—Punitive Damages.**

Punitive damages may be recovered by the husband for injuries inflicted upon his wife in consequence of an unlawful trespass of another, when the wrong is willful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, as an example to others and to vindicate justice.

APPEAL by defendant from *Daniels, J.,* at April Term, 1911, of GUILFORD.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

R. C. Strudwick and F. P. Hobgood, Jr., for plaintiff.
King & Kimball for defendant.

WALKER, J. This action was brought to recover damages for a trespass on land. The plaintiffs, husband and wife, alleged that the servants of the defendant entered upon the land of John May, where they were living, for the purpose of removing telegraph poles, and while so engaged in their employer's business, unlawfully and wrongfully violated the rights of the plaintiffs, as occupants of the land, by entering their home, and accompanied their act of trespass by menaces of violence and the use of profane and vulgar words, and by other conduct and acts, which were unprovoked and nothing less than inexcusable, if not wanton. The defendants justify upon the ground that they had the right to enter in order to remove certain telegraph poles within the right of way of the North Carolina Railroad Company, or its lessee, the Southern Railway Company, and that John May, the owner of the land, licensed them to enter, and that if they did not enter lawfully by his permission, they had the lawful right to enter and remove the poles by reason of the permission of the railway company to the telegraph company to do so, the *locus in quo* being within the right of way of the railway company.

We will assume, for the sake of the discussion, that the defendant, by its servants, entered lawfully upon the land; and yet this did not excuse them for what was done after their entry was made. The servants of the defendant were about their master's business when they committed the act of trespass, and they apparently did it for the purpose of advancing his interests, while doing the work assigned to them by him, in the prosecution of that work and within the scope of their authority.

There were many exceptions taken to matters of evidence, and others were addressed to collateral questions, and all of them subsidiary to the main point.

1. Was the defendant, by its servants, guilty of a trespass upon the plaintiff's premises?

2. If so, were the plaintiffs entitled to recover punitive damages, in addition to those which are compensatory?

The defendant's lawful right of entry upon the land did not authorize it, or its servants, to do so in a violent and insulting manner, regardless of the rights of others. We do not think that we venture anything in asserting this to be a general statement of the law. There was evidence in the case to the following effect: That the servants of the defendant, during the day in question and while on the premises of John May engaged in the work already described, indulged in loud, profane, and boisterous language and sang lewd and vulgar songs, to the terror of the *feme* plaintiff and others; that they yelled at the *feme* plaintiff and others in the house; that they invaded the house and at one time seized a guitar which was there and played on it and sang ribald songs; that Stern, defendant's principal foreman in charge of said crews, went to the well nearby and, facing the open door of the *feme* plaintiff's bedroom, yelled at her and sang lewd and vulgar songs in her immediate presence and hearing; and the noise and tumult, the profanity and vulgar songs of defendant's servants throughout the day and while engaged in moving the poles in question, were so great, loud, and boisterous as to be heard by many people in the neighborhood; that in the morning, standing on the railroad tracks, John L. May, one of the plaintiffs, told Stern and May, the two foremen of defendant, in charge of said crews, of the bad and precarious health of his wife and that she was in the house, and asked them not to go upon the property of his father; that Stern replied that he had orders from the defendant to set the poles on John May's land, and that he would set them there regardless of witness's or any other man's wife, and that he did not "give a damn." There was further evidence as to the injury suffered by the *feme* plaintiff, resulting in a state of unconsciousness, followed by great suffering and permanently impaired health, and as to the damage suffered by the male plaintiff in consequence of the defendant's wrong.

The defendants entered, at first, lawfully, but afterwards abused their right of entry, while in the prosecution of their work, by acts and conduct which were plainly in violation of the rights of the plaintiffs, who were then in the lawful and peaceable possession of the premises. Conduct more reprehensible, under the circumstances, could not well be imagined. The *feme* plaintiff was in a delicate condition, and in consequence of the violent and insulting manner in which the defendants invaded her home and even her private apartments, her health was greatly impaired. Defendant answers that its servants did not know of her physical condition; but this is no excuse. Their tortious acts were the immediate, natural, and proximate cause of her injuries. So far as the liability of the defendant, for this wrong, is concerned, it is not necessary that it should have contemplated the particular injury which the wrongful act produced, but it is liable if the wrong was of such a character as to be injurious in its natural and proximate consequences. It can make no difference, in the view of the law, whether it hurts one part or another of the person who is injured. The law will not excuse a defendant if, in committing the wrongful act, he aimed at the foot to wound and killed by striking the head or the heart. His wrong is the same in law, and is actionable, though he may have missed his mark. He is, in such a case, presumed to have intended the natural and probable consequences of his act. *Drum v. Miller,* 135 N. C., 204. In that case, distinguishing negligent from willful torts, we said: "In the case of willful or intentional wrongdoing, we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter, under the general rule of liability, and, assuming that no just cause of exception to it is present, 'It is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and having begun an act of wrongful mischief, he cannot stop the risk at his pleasure nor confine it to the precise objects he laid out, but must abide it fully and to the end.' The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts." It will be seen from this quotation that, in the case of a willful tort, the wrongdoer is responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury. But the matter is made clearer, and the ruling in that case more pertinent to the question now under consideration, by what the Court said later, at page 214: "It may be stated as a general rule, that when one does an illegal or mischievous act, which is likely to prove injurious to another, or when he does a legal act in such a careless and improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences."

But it seems to us that this case, in all of its essential features, is like that of *Jackson v. Telegraph Co.,* 139 N. C., 347, and must be governed by it. The language there used is so directly applicable to the facts disclosed by the evidence in this case that we cannot more clearly state the law, which we think should determine the question now presented, than by repeating what we then said: "The jury have found that the defendant, by its servant, caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment and in furtherance of the master's business for his benefit and advantage, it would be hard to conceive of one that would come under that class. The case is in principle like that of *R. R. v. Harris,* 122 U. S., 597, which has, at least twice, been approved by this Court. *Hussey v. R. R.,* 98 N. C., 34; *Redditt v. Manufacturing Co.,* 124 N. C., 100. In *Harris's case* the defendants by their servants committed, it is true, a direct and violent trespass upon lands in order to carry on their master's work, and in doing so shot and injured the plaintiff; but is there any difference in law between the two cases? It is not the quality of the act that determines the master's liability, but the fact that it is done by his implied direction, that is, within the scope of the servant's authority, in the course of his employment and in furtherance of his master's interests. *Daniel v. R. R., supra; Daniel v. R. R.,* 117 N. C., 592; *Kelly v. Traction Co.,* 133 N. C., 418; *Lovick v. R. R.,* 129 N. C., 427; *Williams v. Gill,* 122 N. C., 967; *Pierce v. R. R.,* and *Cook v. R. R., supra.* It was in this case a question for the jury under proper instructions from the court, whether McManus in arresting the plaintiff was performing his master's business, or was engaged in some pursuit of his own. *Hussey v. R. R.* and *Daniel v. R. R., supra;* Tiffany on Agency, 271. The court charged fully and correctly in respect to this matter." And so in the case at bar, the court instructed the jury fully upon the facts and the law, in a clear and able charge, which surely could have left no doubt in the minds of the jurors as to what the rights of the parties were under the law and upon the facts as they might find them to be. The fact that the defendant's servants did not commit an assault or a battery upon the plaintiffs cannot change the result. They unlawfully trespassed upon their property, and if their other acts did not, by themselves, constitute an actionable wrong, the jury could, at least, consider them in aggravation of damages.

We held in *Kimberly v. Howland,* 143 N. C., 398, that the general principles of the law of torts support a right of action for physical injuries resulting from either a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter. Approving what is said in the text-books, *Justice Brown,* who wrote an able and learned opinion for the Court in that leading case, thus summarized the result of our investigations: "A recent writer on the subject trenchantly says: 'To deny recovery against one whose willful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent indeed if it should be entitled to respect.' Case and Comment, August, 1906. A text-writer of repute says: 'The preferable rule on this subject is, in our opinion, that if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries result directly from mental disturbance, there should be a recovery for the anguish of mind and the consequent physical loss, irrespective of contemporaneous bodily hurt.' Watson on Damages for Personal Injuries, sec. 405." This is a sufficient answer to the contention that there must have been some direct physical injury to the plaintiffs, in order to render the acts of the defendant's servants tortious, in a legal sense, and consequently actionable.

The *Howland case* also answers another position of the defendant, that the husband of the *feme* plaintiff cannot recover for the wrong done to his wife, and in these words: "It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife, he is entitled to recover therefor, and he may sue in his own name. 15 Am. and Eng. Enc. Law (2 Ed.), 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the court so charged the jury and directed them to allow nothing on that account. His Honor correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife, and that the injury inflicted was of such a character as to deprive the husband of her society, services, aid, and comfort. The court further charged that if the injuries are permanent, the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction, we think, is correct and supported by authority. 6 Thompson's Negligence, secs. 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor under all the circumstances of the case." It may be added that, in this case, defendant's servants trespassed upon the husband's property—his home. He had possession, and they entered after being forbidden to do so.

As to punitive damages, the rule is well settled that when the wrong is willful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, exemplary damages may be added by the jury to punish the offender, as an example to others and to vindicate justice. Hale on Damages, p. 209. The subject is fully considered in the recent case of *Saunders v. Gilbert,* 156 N. C., 463, the facts being substantially like those in this case, and we refer to that decision without further discussion of this exception as to the correctness of the court's ruling that the jury could, in their discretion, allow punitive damages.

We have considered the case as if the defendant's right to enter upon the land as part of the right of way of the North Carolina Railroad Company, by its permission, was clear, though the concession was made only for the sake of argument. It had no right, by itself or its servants, to abuse the license or privilege by grossly violating the rights of others in peaceable possession of the land; and especially, it may be said, the defendant, by its servants, did not have the lawful right to enter the home of plaintiffs in the manner adopted by them. Their entry upon the premises had been forbidden and was opposed, though not forcibly, by the owner and occupants of the land. The acts complained of were committed in an effort to overcome this opposition, by overawing the plaintiffs, in order that defendant's servants might proceed unmolested in the prosecution of their master's business.

The other exceptions require no special consideration.

No error.

S. C. WHITEHURST v. E. P. PADGETT AND M. A. JAMES.

(Filed 13 December, 1911.)

1. **Statute of Frauds—Promise to Pay Debt of Another.**

A promise is not within the statute of frauds requiring that it be in writing and signed, to bind the promisor to answer the debt of another, if it is an original one based upon a consideration; and it is original, whether made before or at the time the debt is created, if the credit be given solely to the promisor or to both promisors as principals; or if it is based upon a new consideration of benefit or harm passing between the promisor and the creditor; or if it is for the benefit of the promisor and he has a personal, immediate, or pecuniary interest in the transaction, in which a third party is also obligor.

2. **Same.**

When the promise relied on to bind the promisor under the statute of frauds to pay the debt of another, does not create an original obligation, and is collateral and merely superadded to the promise of another to pay the debt, who remains liable therefor, the statute applies and the second promisor is not liable upon his promise, unless it was reduced to writing and signed as required by the statute; and this is true whether his promise was made at the time the debt was created or afterwards.

3. **Same—Landlord and Tenant—Assertion of Tenant—Direct Interest.**

When a tenant of a farm has applied to a merchant to furnish him with fertilizers for making the crop on the leased premises, saying that the landlord would pay for them, the assertion of the tenant will not of itself render the landlord liable; but if the latter, when called upon by the merchant at the time of the transaction, says, "All right, go ahead and furnish (the lessee) and I will see that you get the money," his words may amount to a binding and sufficient promise under the statute of frauds, as he had a direct and pecuniary interest in the making of the crop as the landlord of the first promisor.

4. **Statute of Frauds—Landlord and Tenant—Joint Promisors—Evidence—Questions for Jury.**

In this case the question whether the landlord intended to become a principal with the lessee of his lands, in the debt for fertilizers furnished to make a crop thereon under his promise to see that the merchant got his money, was fairly submitted to the jury under correct instructions of the court upon the evidence.

5. **Statute of Frauds—Landlord and Tenant—"Promise" Relied on—Evidence.**

Evidence tending to show that a landlord, at the time of the transaction, promised a merchant furnishing his tenant fertilizers with which to make a crop on his land, that he would "see" that the fertilizer was paid for, is sufficient evidence to go to the jury as to whether the merchant relied upon the promise at the time it was made, and furnished the fertilizer upon the faith of it.

6. **Evidence—"Best" or Primary Rule—Book Entries—Parol Evidence—Collateral Matters—Competency—Harmless Error—Appeal and Error.**

In an action against the landlord and tenant for fertilizers furnished to the latter to make a crop on the leased lands of the former, seeking to hold the landlord answerable on his promise to "see" that the fertilizers were paid for, testimony of a witness for the plaintiff that the fertilizers were charged to both defendants, is competent: (1) The best or primary rule does not apply, for the book entries were not directly involved in the issue, and were not required to be in writing by the statute of frauds; (2) it was irrelevant as to the tenant, and therefore harmless, and not having been objected to by the landlord, it is not reviewable on appeal as to him.

7. **Appeal and Error—Objections and Exceptions—Harmless as to One—Defendant.**

When there are two or more defendants and an exception to the admissibility of evidence is taken so that it does not appear by which one, it will not be held reversible error on appeal when it is harmless as to one of them. (Rule 27, 140 N. C., 495.)

APPEAL by defendants from *Ferguson, J.*, at January Term, 1911, of PITT.

F. G. James & Son for plaintiff.
Julius Brown for defendant.

WALKER, J. Plaintiff had a store at Grindool, and defendant. Alexander Padgett, lived on the Barnhill land, which he had leased from his codefendant, M. A. James. There was evidence tending to show that Whitehurst, at the request of Padgett and James, furnished Padgett with fertilizers to the amount of $284.31, for use on the Barnhill place, as tenant of James. The material facts, according to the plaintiff's testimony, were these: Padgett applied to Whitehurst for the fertilizer and told him that James would pay for it. Whitehurst saw James afterwards, who said to him: "All right, go ahead and furnish Padgett, and I will see that you get your money." He was afterwards told by Whitehurst that the debt for the fertilizer was due, when he said: "I will see that you get your money, if I do not get a cent." There was evidence for the defendant that no such promise had been made by James, but, on the contrary, that Whitehurst had refused to accept the promise of James to pay for the fertilizer. Defendants also relied upon the statute of frauds. The court charged the jury that Padgett could not bind James by any declaration that the latter had told him to buy the fertilizer on his credit and responsibility, unless they found that James had authorized the purchase by Padgett from Whitehurst, and agreed to become liable for the same; that they would consider all the evidence and find therefrom whether such authority had been given, and that if they should find that the authority was given, their verdict would be for the plaintiff; otherwise, for defendant. The jury returned a verdict against defendants, and they appealed.

We see no objection to the charge of the court. In *Peele v. Powell,* 156 N. C., 553, we held that a promise is not within the statute of frauds, if it is based upon a consideration and is an original one, and that it is original if made at the time or before the debt is created, and the credit is given solely to the promisor or to both promisors, as principals; or if the promise is based upon a new consideration of benefit or harm passing between the promisor and the creditor; or if the promise is for the benefit of the promisor and he has a personal, immediate, and pecuniary interest in the transaction, in which a third party is the original obligor; but if the promise does not create an original obligation, and is collateral and merely superadded to the promise of another to pay the debt, who remains liable therefor, the statute applies, and the second promisor is not liable upon his promise, unless it was reduced to writing and signed, as required by the statute; and this is true whether his promise was made at the time the debt was created or afterwards. Numerous authorities were cited to support these principles, and among others, the following: *Neal v. Bellamy,* 73 N. C., 384; *Dale v. Lumber Co.,* 152 N. C., 653; *Hospital Association v. Hobbs,* 153 N. C., 188; *Morrison v. Baker,* 81 N. C., 80; *Shepard v. Newton,* 139 N. C., 536; *Haun v. Burrell,* 119 N. C., 547; *Horne v. Bank,* 108 N. C., 119; Browne on Statute of Frauds, sec. 197; and the authorities sustain the rules laid down by the court.

Whether the defendant James intended to become a joint principal with Padgett, his tenant, was fairly and correctly submitted to the jury by the court upon all the evidence, and there was more than we have considered it necessary to recite. James had a direct personal and pecuniary interest in the transaction, and made the promise, as the jury finds, at the time the goods were furnished or the debt was contracted, and it is evident, the jury having found the fact as to the promise in favor of plaintiff, that he relied upon it at the time and furnished the fertilizer upon the faith of it. In the case of *Threadgill v. McLendon*, 76 N. C., 24, where words almost identical and, at least, substantially the same as those used by James, according to plaintiff's testimony, the Court held that it was properly left to the jury to say whether the credit was not in the first instance given to the promisor, who was a landlord and who, as the Court says, was interested to have his tenant or cropper furnished with necessary supplies to make his crop and had a lien upon it. That was the first reason for the decision, and it is applicable to this case. It would not be fair for the defendant to rely upon the statute, under such circumstances, it having been passed to prevent frauds and not to encourage them, as was said by *Judge Pearson,* for the Court, in *Threadgill v. McLendon, supra.*

The plaintiff was asked by his counsel to whom he had charged the goods on his books, and replied that they were charged to Padgett and James. Defendants objected to the question, but it was irrelevant as to Padgett, and, of course, harmless, and therefore was not objectionable as to him. It does not appear that James individually objected to it. If we treat the objection as having been made by one of the defendants, and not by both, it does not appear which one made it, and the objection, being untenable as to Padgett, must fail. Rule 27 (140 N. C., 495). But we think the "best or primary rule" does not apply. The book entry and its contents are not directly involved in the issue. The plaintiff was not suing upon the entries, but upon the contract, which was not required to be in writing. McKelvey on Evidence (2 Ed.), pp. 425-428, after stating the old rule, thus refers to the modern rule: "Where the writing is not in issue, but merely collateral to it, it is held that the rule has no application, and parol evidence may be given, even though it covers the contents of the writing. An interesting question arises where the allegation is that a book or documents do not contain certain matter. It has been held here that oral testimony of any one who has examined the writing may be given in support of the allegation. In a certain sense the writing itself may certainly be regarded as the best evidence of what it does not contain, as well as what it does contain, yet there may not be the same difficulty in establishing that a certain matter is not contained in a writing as in determining with exactness its actual contents, and there may, therefore, be less reason for the enforcement of the best-evidence rule." He cites the case of *Coonrod v. Madden*, 126 Ind., 197, and our case of *Ledford v. Emerson*, 138 N. C., 502, which seems to be as extreme an application of the rule of the best evidence as can be supposed. It was there held that "the rule excluding parol evidence as to the contents of a written instrument applies only in actions between parties to the writing, and when its enforcement is the substantial cause of action, and not where the writing is collateral to the issue."

We have carefully considered the other rulings of the court, to which exceptions were taken, and find no reversible error therein.

No error.

IN RE WILL OF W. T. JENKINS.

(Filed 13 December, 1911.)

1. **Wills, Holographic—"Valuable Papers and Effects"—Interpretation of Statutes.**

   The statute as to a holographic will requires that the paper must have been found "among the valuable papers *and* effects of the deceased" (Revisal, sec. 3127). The substitution, in the Revised Code, of the word "and" for the word "or," was not intended to make any substantial change in the law, and the word "and" should be construed as "or."

2. **Same—Policies of Insurance.**

   The word "effects," as used by Revisal, sec. 3127, includes policies of fire insurance within its meaning.

3. **Wills, Holographic — Interpretation — Construed Strictly — Expressed Purpose—"Valuable Papers and Effects"—Interpretation of Statutes.**

   While the statute relating to holographic wills is mandatory and is to be construed strictly with reference to its requirements, it will not be so rigidly enforced as to defeat its clearly expressed purpose, and it is sufficiently complied with as to the place where the script must be found to constitute a valid will, if it is found among the valuable papers and effects of the deceased, under such circumstances as to show that he regarded it as a valuable paper worthy of preservation and desired it to take effect as his will. *Hughes v. Smith*, 64 N. C., 493, cited and applied.

4. **Wills, Holographic—"Valuable Papers and Effects"—Comparative Values—Interpretation of Statutes.**

The statutory requirement that the script must be found "among the valuable papers and effects" of the deceased to constitute a valid holographic will, does not mean that the "papers and effects" must be the most valuable, for such would be uncertain of ascertainment and likely to vary with the changing condition of the affairs of the deceased, and to depend upon his condition in life and business habits, and confusing in the event the deceased had more than one place of deposit for them.

5. **Wills, Holographic—Valuable Papers and Effects—Depository—"Found"—Presumptions—Interpretation of Statutes.**

The fact that a holographic will is found among the "valuable papers and effects" of the deceased implies that it was placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will.

6. **Same.**

The statute requires proof that the script was *found* among the "valuable papers and effects of the deceased" to be valid as a holographic will, not that it was personally placed there by the author, and proof that the paper was thus found is sufficient in the absence of countervailing evidence.

7. **Same—Evidence—Nonsuit.**

The deceased, whose holographic will is caveated, had several places of deposit for his "valuable papers and effects"—his desk in his store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. There was evidence tending to show that after several weeks of unavailing search after his death, a script written by him and sufficient as his holographic will was found in the hall table drawer, which was little used, with his policies of fire insurance, all of which had expired but one, in a package marked "Important," in his own handwriting: *Held*, a motion for judgment of nonsuit upon the evidence should be overruled which was based upon the ground that there was no evidence that the holographic will had been found among "the valuable papers and effects" of the deceased.

8. Same—Instructions.

Upon the evidence in this case it was proper for the trial judge to instruct the jury that if they found that the deceased placed the script in an envelope, with certain policies of fire insurance, and deposited them in a drawer of the table in the hall of his home, intending that it should be his will, the requirements of the statute were fully observed.

APPEAL from *Joseph S. Adams, J.*, at January Term, 1911, of HALIFAX.

This is a caveat to a paper-writing which purports to be the last will and testament of W. T. Jenkins. Upon issues submitted to them, the jury found that the script and every part thereof is in the handwriting of the said Jenkins. It was unattested. The jury also found that the paper-writing, which had been proved in common form, is the will of W. T. Jenkins.

The evidence tended to show that Jenkins died in May, 1909, and after his death a search was made for a will by Levi Browning, who married his niece, and had lived in the house with him three years, his wife having lived there practically all her life. The witness Browning testified that they searched the clothes of the deceased and looked over the papers and his house and his room. On direct examination he said there were no papers in the house, but on cross-examination corrected that statement and said that there were some papers in W. T. Jenkins' bedroom in a bureau. They did not find a will in the house, according to Browning, and proceeded to examine the papers at W. T. Jenkins' store. The witness was asked:

Q. W. T. Jenkins was a business man, was he not? A. Yes, sir; so far as I know.

Q. He did have some papers that you found at the store? A. Yes, sir.

Q. Valuable papers—notes and mortgages, were they not? A. I don't know that they were so valuable; didn't seem to be kept up. Of course, there were some valuable papers in them—some deeds and things.

According to the evidence of Browning and other witnesses, Captain Jenkins was a man of good business judgment, and a great many of the people in the neighborhood would come and get him to write papers for them. The paper-writing was dated

9 April, 1909, and the witness testified that W. T. Jenkins' mind was sound at that time. Browning further testified that after N. E. Jenkins, a brother of the deceased, had qualified as administrator, which was twelve or fifteen days after the death of Captain Jenkins, he renewed the search for a will and found the paper-writing offered for probate in a table drawer in the hall of Captain Jenkins' house. The paper was in an envelope with some insurance papers—insurance on his gin and dwelling—only one of which was then in force. After finding this paper, the witness, according to his own admission, did not tell any one connected with the estate or with Captain Jenkins about finding this paper until it was offered for probate, and he refused to let anybody compare the handwriting. Carrie E. Browning, who will take one-half of the estate of Captain Jenkins if this will is sustained, and who is the wife of Levi Browning, testified that it was two or three weeks after the death of Captain Jenkins before the will was found. She describes the finding of it as follows:

"Well, as there had not been one found, of course we were on the lookout for one. We were hunting for some medicine my husband was taking; there was a person in the neighborhood who wanted some poison, and he wanted to send him some sugar of lead, and he, with the object in view of finding a will, if there was one, and to get this medicine, happened to think of this drawer, and went in there and found this paper." Mrs. Browning was asked why the table was not examined earlier. She answered: "*Because we did not think of papers being in there*, as it was used for this poison medicine generally, as well as other kinds." The witness also said that she had turned the drawer to the wall to keep the children from going in where this medicine was. She further said: "I knew what was in the drawer, but it was a drawer not used much—in everyday use, I should have said." Asked, "How long, Mrs. Browning, before the death of Captain Jenkins did you go in the drawer?" she answered: "Well, it probably might have been several months since we needed an article in that drawer."

Q. During his sickness you kept his medicines in that drawer? A. No, no; did not keep them in there. We had them fresh from the doctor—kept them right on his table and administered them from his table.

Levi Browning was recalled and testified that he found the paper in an envelope which was offered in evidence, and that insurance policies were also in the envelope. There was evidence that the will was found in an envelope on which was written, in the handwriting of W. T. Jenkins, the word "Important." Much testimony was introduced by the propounders to prove that the script was in the handwriting of W. T. Jenkins, and by the caveators to show the contrary. Evidence was also offered by the caveators as to the circumstances under which the paper was found in the drawer. N. E. Jenkins, a witness for the caveators and a brother of the deceased, testified that he examined all the papers of W. T. Jenkins, both at his house and store, but could not find a will; about fifteen days after his brother's death he qualified as administrator, and several days later, about the 18th or 19th of May, he received notice of the existence of this paper, but was not notified by Browning.

At the close of the caveators' evidence, Levi Browning was again recalled, and testified that there was another policy in the envelope, that had expired. At the close of the evidence the caveators requested the court to instruct the jury that, upon the evidence, they should answer the issue "No," thereby finding that the paper-writing exhibited by the propounders is not the last will and testament of W. T. Jenkins, and they also asked for special instructions based upon the insufficiency of the evidence to establish the will, all of which were refused, and caveators excepted and from the judgment against them appealed to this Court.

W. E. Daniel and R. C. Dunn for propounders.

Murray Allen, Joseph P. Pippen, and George C. Green for caveators.

WALKER, J., after stating the case: There was sufficient evidence in the case to prove that the script was found in the drawer with policies of insurance, some of which had expired, and that it had been placed there by W. T. Jenkins, in an envelope upon which he had written the word "Important," and that Levi Browning, when he found it, immediately took it from the envelope and read it to his wife, and the next morning she read it. In the paper, the testator devised and bequeathed his property to his nieces, Bessie M. Liles and Carrie E. Browning, wife of Levi Browning, who seem to have had the best claim upon his bounty, and appointed as his executor Hon. E. L. Travis, who had been his attorney and legal adviser. The formal execution of the script was sufficiently proved before the clerk, and at the trial of the issue *devisavit vel non;* but the contention of the caveators is that the paper was not found "among the valuable papers and effects" of the deceased, as required by statute (Revisal, sec. 3127). Prior to the enactment of the Revised Code, the language of the statute was "that such will was found among the valuable papers *or* effects of the deceased." We do not think the substitution of the copulative for the disjunctive conjunction was intended to make any substantial change in the law, and the word "and" should be construed as "or." Otherwise, a person owning effects of ever so much value, but not having any valuable papers, or a person having valuable papers, but no valuable effects, could not execute a valid holographic will. We cannot believe the Legislature contemplated such a radical change in the law and that any such result should follow the change of a single word, and it has been so held, with good reason. *Hughes v. Smith,* 64 N. C., 493; *Winstead v. Bowman,* 68 N. C., 170. In the last case, *Justice Rodman* said: "We do not think this substitution ('and' for 'or') was intended to make any change in the meaning of the statute. At all events, it made none to affect the present case. We only notice it to put it out of the way." Besides, the word "effects" is comprehensive in meaning and is broad enough to include policies of insurance, which will answer both descriptions, valuable papers and effects. *Brown v. Eaton,* 91 N. C., 26.

We will now proceed to consider the other question, whether the paper was found in a proper place of deposit. "The statute of frauds in England, in relation to wills, and our act upon the same subject, have in view the same object, namely, the protection of the heirs at law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English, and our statute, except as to the number of witnesses, are substantially the same. It is well known to the profession how strictly—we may say, sternly—the courts, in both countries have demanded a compliance with these provisions of the law. The same policy must govern us when we come to decide whether the requisitions of our statutes have been complied with in the execution of a paper-writing, propounded as a holograph will. One alternative requisition of the statute is that it must be 'found among the valuable papers or effects' of the alleged testator." *Little v. Lockman,* 49 N. C., 495. The provisions of the statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holograph script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably. "The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as that the deceased regarded it as a valuable paper (worthy of preservation) and desired it to take effect as his will." *Hughes v. Smith, supra.* This Court said in *Winstead v. Bowman,* 68 N. C., 170: "We are led to conclude that the phrase 'among the valuable papers and effects,' cannot, necessarily and without exception, mean 'among the *most* valuable,' etc. If that were required, it might be difficult for one who had two or more places for keeping his valuable papers to know in which he could safely place his will. The values in cash would be liable to change more or less frequently. It might well happen that a bond or a large sum might be paid off and the money deposited in bank or invested in real estate, so that the place which contained the most valuable papers to-day might to-morrow contain only those of comparatively insignificant value. The phrase cannot have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed, viz., whether at home or on a journey, etc. It was not the intention of the Legislature to destroy, or unreasonably restrict, the power of making a holograph will; but simply to assure that the writing offered as a will was really and deliberately intended as such. The place in which it is found, supposing it to be found among valuable papers and effects, is but one circumstance in evidence upon that issue." Referring to this passage in *Judge Rodman's* opinion, the present *Chief Justice* said *In re Sheppard's Will,* 128 N. C., 54: "In *Winstead v. Bowman,* 68 N. C., 170, that Court criticised, if it does not overrule, the narrow rule which had been laid down in *Little v. Lockman,* 49 N. C., 494," citing with approval *Tate v. Tate,* 30 Tenn. (11 Head.), 466, to this effect: "The intention of the statute is that it shall appear to be a will whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will"; and, also, *Reagan v. Stanly,* 179 Tenn. (11 Lea), 316, to this effect: "In a diary was found, imbedded among other entries, a disposition of property, written and signed. This diary was found among his books of account, and the will therein written was (held to have been properly) admitted to probate." Substantially to the same effect is *Harper v. Harper,* 148 N. C., 453. The fact that it is found among the writer's valuable papers and effects implies that it must have been placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will, and not that it was deposited surreptitiously by another person for the purpose of defeating instead of executing his will. If the paper is so found, it will be presumed that the deposit of it in the place was made by him or with his assent, and in the absence of evidence to the contrary or of suspicious circumstances, no proof of the fact is required. Pritchard on Wills, sec. 236; *Hooper v. McQuary,* 5 Cold., 136. The statute does not demand proof that the author of the paper made the deposit, but only that it was *found* among his valuable papers and effects, and proof of this fact is quite sufficient, at least, in the first instance and when there is no countervailing proof. "'Valuable papers' within the meaning of the statute are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently, the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator." Pritchard on Wills, sec. 237; *Winstead v. Bowman,* 68 N. C., 170; *Marr v. Marr,* 2 Head., 303 (S. E. 5 Sneed, 385); *Allen v. Jeter,* 6 Lea, 672; *Reagan v. Stanly,* 11 Lea, 316.

Applying these principles to the facts of our case, it would seem that there had been such a full compliance with the provisions of the statute as to constitute the paper-writing found in the drawer of the table the will of the writer. He appears not to have been very careful in handling his papers. There were these places of deposit: his desk in the store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. It would appear that of the four, he regarded the drawer of the table as the most important place of deposit, for he not only placed in it his policies of insurance, but the script was found in an envelope on which he had written the word "Important." What could be more indicative of his desire that the paper should take effect as his will, and of the fact that he considered the place as one for the deposit of his valuable papers, than his words that the papers inclosed in the envelope were "important"? But aside from this fact, a policy of insurance is a valuable paper (*Harper v. Harper, supra; Hooper v. McQuary, supra*) within the meaning of the statute, and it was evidently so considered by him. As testified by one of the witnesses, the papers in the other places of deposit were not so kept as to show that he regarded them as of any great value, nor, under the circumstances, would it be any more likely that his will should have been found there than in the drawer of the table at his home? The court left it to the jury to say whether, under all the facts and circumstances, W. T. Jenkins had placed the paper in the drawer with the intention to preserve and take care of it as his will, telling them that within the meaning of the law a policy of insurance is a valuable paper. The jury were properly instructed as to how they should consider and apply the evidence in the case. We do not see why this was not a proper instruction, and as much so as similar ones which were given in the cases we have cited. Whether the table drawer was a proper place of deposit under the statute was a question to be determined largely by the jury upon the particular facts of the case. It was certainly not error to submit the question to the jury instead of deciding it as matter of law. *In re Sheppard's Will, supra.* If the jury found that W. T. Jenkins placed the paper in the envelope, with the policies of insurance, and deposited them in the drawer, intending that it should be his will, the requirements of the statute were fully observed, and their verdict declaring the paper to be his last will and testament was warranted in law.

The case of *Brogan v. Barnard,* 115 Tenn., 260, cited by appellant's counsel, is not in point. It was decided upon the ground that the stamps and stationery were not valuable papers, as they did not record anything, and, besides, they did not belong to the writer of the script, but to the United States.

We find no error in the rulings or charge of the court.

No error.

FANNY V. ARTHUR v. P. S. HENRY.

(Filed 20 December, 1911.)

Measure of Damages—Fear and Fright—Physical Suffering.

In this action for damages alleged to have been caused by the negligence of defendant in blasting with loud noises near the plaintiff's home and causing rocks and débris to fall on the premises, the question of damages was correctly limited by the charge of the court to such as were caused by the acts complained of, and not otherwise, excluding such as may have been occasioned from fear and fright alone, and which did not cause physical injury.

APPEAL by defendant from *Webb, J.*, at May Term, 1911, of BUNCOMBE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Allen.*

ALLEN, J. The evidence in this case and the questions presented are practically identical with those in the case of *John P. Arthur v. Henry, ante*, 393, except in that case the plaintiff was seeking to recover damages for injury to his property, compensatory and punitive, while in this the plaintiff, who is a sister of John P. Arthur and lived in the house with him, sues to recover damages for injury to her health.

In this action punitive damages were not awarded.

There was evidence which, if accepted by the jury, established the fact that the plaintiff was made sick and suffered in body and mind as the result of the operations of the defendant and of the Faragher Company, for whose acts the defendant was liable, and his Honor was careful to exclude the idea that the plaintiff could recover for fright unaccompanied by physical injury.

He said to the jury: "That mere fright is not actionable. Because a man or woman gets frightened at something, it is not actionable. If you find that the plaintiff in this cause was frightened, that she was put in fear, the court charges you that that is not actionable; but if you find that she was put in fear and frightened to such an extent that she suffered physical pain, suffered in body and mind, and was made sick, and that such fright and fear were brought about by the negligence of the defendant and was its proximate cause, then the law says it is actionable.

"If you find the defendant was guilty of negligence, and that rocks fell about the house, and that thereby she was put in fear or frightened, but if you find that she was not made sick by reason of such fright, but her sickness was caused by other causes, that her sickness came from some other cause, and that she was not made sick by reason of this fright, and that she was made sick by some other cause than the fright, she could not recover. As I have said, mere fright is not actionable; but if she was put in fear by reason of rocks falling around, if you find they did so fall, and she became sick, and that the sickness was the immediate result of the fright, that the sickness followed from the fright, and that had it not been for such fright and fear the sickness would not have come, then it is actionable; but if it did not flow directly from that, she would not be entitled to recover.

"Or if you find that she was not put in fear and not frightened, and not made sick by the negligence of the defendant, if such acts were negligent, then she would not be entitled to recover. If you find that she was consulted, and that she consented that they might go on with blasting, on condition that they would come and give her notice before the blasts were set off, and that they did give her notice, then the court charges you that she could not recover."

This follows the principle announced in *Kimberly v. Howland,* 143 N. C., 398, which has been affirmed in *May v. Telegraph Co., ante,* 416.

No error.

T. G. BEARD v. W. M. TAYLOR.

(Filed 20 December, 1911.)

1. **Instructions—Verdict, Directing—Appeal and Error—Absence of Evidence.**

   An instruction by the Superior Court, that if the jury find from the evidence the existence of certain facts, to answer an appropriate issue in a certain way, cannot be reviewed in the Supreme Court when the evidence referred to is not disclosed by the record.

2. **Deeds and Conveyances—Descriptions—Evidence.**

   There must be competent evidence to fit the lands in controversy to the description in the deed, for the party claiming under the deed to recover.

3. **Instructions—Presumed Correct.**

An instruction given by the trial court to the jury is presumed to be correct, nothing appearing of record to the contrary.

4. **Deeds and Conveyances—Description—Uncertainty—Impossible of Location.**

A deed to the purchaser of lands at an execution sale is void for uncertainty of description which conveys "about eleven acres (of land owned by T.) where he now lives, excepting three acres, including house and barn, which was allotted to him as his homestead, the remaining eight acres or so much thereof as may be necessary to satisfy said execution," for the reason that it is impossible to say what part of the eight acres is intended to be conveyed.

APPEAL from *Webb, J.*, at July Term, 1911, of SWAIN.

The entire case on appeal is as follows:

This is an action of ejectment against Taylor, the judgment debtor, by Beard, judgment creditor, the grantee of the purchaser at the execution sale.

The court submitted the fourth issue, set out in the record, and charged upon the same as follows:

"The court charges you that if you believe all the evidence in this case you will answer the fourth issue 'No.' The court is of the opinion, and so charges you, that the description in that deed from the sheriff to the party under whom the plaintiff claims is so vague and insufficient that it does not convey any property at all, or any part thereof. So the court charges you that if you believe all the evidence you answer the fourth issue 'No.'"

To this charge the plaintiff Beard excepts—or, to be more specific, to the part, "The court charges you that if you believe all the evidence in this case, you will answer the fourth issue 'No.'"

Also to the part: "The court is of the opinion, and so charges you, that the description in that deed from the sheriff to the party under whom the plaintiff claims is so vague and insufficient that it does not convey any property at all, or any part thereof."

The plaintiff Beard excepts to that part of the judgment in this action on said fourth issue declaring that plaintiff is not the owner of the eleven acres or any part thereof.

The following statement appears in the record:

"Calls of Sheriff's Deed of 11-Acre Tract: Also another tract of land owned by W. M. Taylor, containing about eleven acres, where he now lives, excepting three acres including house and barn, which was allotted him as his homestead, the remaining eight acres or so much thereof as may be necessary to satisfy said execution."

There was a judgment in favor of the defendant, and the plaintiff excepted and appealed.

F. C. Fisher for plaintiff.
Bryson & Black for defendant.

ALLEN, J. The case on appeal does not disclose what evidence was introduced on the trial, nor does it set out or identify the deed referred to, and as the action of the judge is presumed to be correct, we must affirm the judgment.

If, however, the exception is intended to present the correctness of a ruling by the judge that the description under the heading, "Calls of sheriff's deed for eleven-acre tract," is void for uncertainty, we would hold that there is no error.

If the description had stopped at the word "homestead," it would have been sufficient, but the additional clause makes it impossible to say what part of the eight acres is intended to be conveyed.

Cathey v. Lumber Co., 151 N. C., 592, is in point. In that case the grantor attempted to convey 324 acres, part of a tract of land of 724 acres, and it was held that no title passed, the Court saying: "The deed under which defendant claims does not purport to convey the whole of a described tract of land, but only a certain number of acres thereof, to wit, '324 acres of land, part of a certain tract of land composed of Nos. 3044, 3097, and 3098, in Graham County.' The boundaries of the entire tract, from which the 324 acres are to be taken, are set out with exactness, and the entire tract, as stated in the deed, contains 724 acres. The deed furnishes no means by which the 324 acres can be identified and set apart, nor does the instrument refer to something extrinsic to it by which those acres may be located. It is self-evident that a certain part of a whole cannot be set apart unless the part can be in some way identified. Therefore, where a grantor undertakes to convey a part of a tract of land, his conveyance must itself furnish the means by which the part can be located; otherwise, his deed is void, for it is elementary that every deed of conveyance must set forth a subject-matter, either certain within itself or capable of being made certain by recurrence to something extrinsic to which the deed refers."

The judgment must be affirmed.

No error.

CHARLES BUCKEN v. SOUTH AND WESTERN RAILWAY COMPANY.

(Filed 20 December, 1911.)

1. **Master and Servant—Servant's Torts—Scope of Employment—Respondeat Superior.**
   The master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing the work, but wholly for the servant's own purposes and in the pursuit of his private or personal ends.

2. **Same—False Imprisonment—Assault and Battery—Evidence—Questions for Jury.**
   In this action to recover damages for false imprisonment, and assault and battery, alleged to have been received at the hands of defendant's agents, there is sufficient evidence that the acts complained of were done in the furtherance of the master's work for the application of the doctrine of *respondeat superior*.

3. **Appeal and Error—Case Agreed—Stenographer's Notes.**
   An agreement by counsel that the record proper and stenographer's notes shall constitute the case on appeal will not be considered by the Supreme Court, as such is in direct violation of Rule 22. *Cressler v. Asheville*, 138 N. C., 483, cited and applied.

APPEAL from *Lane, J.*, at November Term, 1911, of BUNCOMBE.

Civil action brought to recover damages for false imprisonment, assault and battery, and other wrongs alleged to have been received at hands of defendant's agents. At conclusion of the evidence his Honor sustained motion to nonsuit, and plaintiff appealed.

Tucker & Lee and W. T. Morgan for plaintiff.
Locke Craig, A. Hall Johnston, and J. Norment Powell for defendants.

BROWN, J. This appeal is *in forma pauperis* and comprises 134 typewritten pages, of which 110 pages comprise the evidence in chief, cross-examinations and reëxaminations as taken down by the stenographer in the form of question and answer. The defendant offered no evidence and the witnesses for plaintiff were few in number. At the end of the stenographer's notes is this entry: "It is agreed that the record proper and stenographer's notes shall constitute case on appeal." There is no other attempt to make out a case on appeal, as required by law. This is in direct violation of the rule of this Court, No. 22, and of its express decision in *Cressler v. Asheville,* 138 N. C., 483.

That such of the evidence as is necessary to present the assignments of error could easily have been stated in condensed narrative form is manifested by the fact that the counsel for plaintiff and defendants have set out in their respective briefs very clear and brief statements of the evidence, which substantially agree.

Under the circumstances of this case we will make an exception and not dismiss the appeal, but we will be compelled to do so in the future unless our rule is observed.

We have been saved the great labor of a close perusal of this bulky transcript by adopting practically the facts as stated in defendant's brief, as follows: "In February, 1906, the defendants, Carolina Company and South and Western Railway Company (no question being made in this case as to their relation to each other or to the work), were engaged in grading and constructing a line of railway through McDowell County, employing several thousand men at different camps. During that month plaintiff, then at Spartanburg, S. C., was employed by one Redericks to work on said road. In company with others, he went from Spartanburg via Asheville, to Marion, walked nine or ten miles from Marion to Camp 9, where he was told by Captain Harris (who the evidence shows was superintendent at Camps 8 and 9) that he was not needed at Camp 9, and directed to go to Camp 8. Plaintiff thereupon walked to Camp 8, three miles distant, reached there late in the day, had his name given to the walking boss there, was employed at Camp 8, made arrangements to go to work there, and the next morning went to work and worked half a day, and then, in company with Wheeler and Wyatt, two of the men who had come with him, started home, carrying his baggage. When about midway on the road to Camp 9, they were met by two men, one of whom they identify as Captain Harris. Harris drew a pistol on Wheeler and the other man drew a pistol on plaintiff and Wyatt, and all were commanded to throw up their hands, which they did. Harris then asked where they were going, and, upon being informed that they were going home, told them to go back to Camp 8, which they refused to do. Thereupon Harris asked their reason, and they answered that it had been misrepresented to them. Harris then said that Redericks was at Camp 9 and they would go down and see whether he misrepresented things or not. Harris and the other man rode behind them, Harris cursing them all the way, with his pistol drawn, and upon their arrival at Camp 9, Harris called to a man, 'Sheriff, here are some more hoboes,' and directed the man whom he called sheriff to put them in one of the overseer's houses that had a sufficient lock on it. The evidence shows that the man addressed as 'sheriff' was George Carson, and that he was a walking boss or camp superintendent of one of the defendants at Camp 9, with authority to employ and discharge men at that camp.

"This man thereupon told plaintiff and his two companions to consider themselves under arrest, searched them, took their money, valuables and baggage, and drove them before him with drawn pistol to a room, where he locked them up. Some time that night plaintiff was called to the door by this man, who drew a sack over his head and, with others not identified, led, dragged, and kicked him some distance from the house, flogged him severely, ordered him to leave, fired off pistols and ran him away from the camp. As a result of this cruel treatment, plaintiff was severely and permanently injured."

The defense is that the defendants are not liable for the acts of their superintendent and other agents, as such acts were beyond the scope of their authority. The facts as stated by the defendants' counsel show a degree of severity, abuse, and violation of law which should bring upon the servants of defendants who committed them the punishment of the criminal law. As stated by plaintiff's brief, they disclose a degree of brutality almost unbelievable.

In addition to the statement copied from defendants' brief, the evidence tends to prove that the defendants were engaged in building the railroad, and no question as to an independent contractor is raised. One Fred. Rederick was defendants' labor agent employed to secure laborers for defendants, and in such capacity he employed plaintiff and furnished his transportation to defendants' camps, and there some little provisions, etc., were advanced him. Harris was the superintendent of the work of construction and in control of the labor camps and laborers. Carson and Foster were the walking bosses at camps and had absolute control in superintendent's absence. The arrest was made by the superintendent of defendants while about his master's business, and in the furtherance of the interests of the master, the evident purpose of the arrest being to force the plaintiff to return to work and pay his transportation. When the pistols were leveled at plaintiff, the purpose of the arrest was then and there made known by the superintendent: "He told us that we would have to go back to Camp 8; that we were not going to leave there"; "Go back up there, and go quick"; "Go on back up there and pay your transportation"; "We don't owe any transportation"; "Oh, yes, you do, damn you, and you will go back and pay it," etc. Harris had charge of both Camps 8 and 9, and while on duty and looking after his master's interests, and not for any purposes of his own, he took plaintiff under arrest and held him helplessly imprisoned until he was taken out and beaten that night.

It is contended, and it may be inferred from the evidence, that the very room in which plaintiff was confined was constructed by defendants for prison purposes in order to enforce obedience to the commands of its superintendent and foreman, and to prevent escapes.

We recognize the well-established rule that the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing his work, but wholly for the servant's own purposes and in pursuit of his private and personal ends. But that is not the only inference that can be drawn from the evidence in this case. There is nothing to show that Harris and Carson had any private ends of their own to pursue or that they had quit sight of the company's work and were following the suggestions of their own malice. On the contrary, the evidence shows that they assaulted and imprisoned plaintiff to force him to pay the alleged debt to the company and to compel him to work against his will on the company's road.

This question has been very elaborately discussed in several recent opinions of this Court, and it is useless to "thresh over old straw."

The principles laid down in *Jackson v. Telegraph Co.,* 139 N. C., 353; *May v. Telegraph Co., ante,* 416; *Berry v. R. R.,* 155 N. C., 287, are clearly applicable to the facts of this case as now appearing.

The subject is also fully discussed, and distinctions drawn in *Daniel v. R. R.,* 136 N. C., 527; *Sawyer v. R. R.,* 142 N. C., 1; *Stewart v. Lumber Co.,* 146 N. C., 49; *Marlowe v. Bland,* 154 N. C., 140, and *Dover v. Manufacturing Co., ante,* 324; *Roberts v. R. R.,* 143 N. C., 180.

His Honor should have submitted the issues to the jury under appropriate instructions.

The judgment of nonsuit is set aside.

New trial.

F. A. LANCE v. J. N. RUSSELL.

(Filed 20 December, 1911.)

1. **Pleadings—Allegations—Cause of Action—Interpretation—Trusts and Trustees—Lands—Accounting—Possession.**

   In an action for damages arising from a breach of trust of defendant in conveying at an inadequate price certain lands conveyed by the plaintiff to him, by deed absolute upon its face, but, in accordance with a contemporaneous unregistered agreement, to be held in trust by the defendant and sold at a fair price to pay a debt the plaintiff owed him, and the surplus to the defendant: *Held*, an allegation by plaintiff in his complaint, in substance, that he was resisting an action for possession by defendant's vendee, not sufficient to justify a dismissal of the action.

2. **Reference Set Aside—Discretion—Appeal and Error.**

   The setting aside an order of reference by the trial judge upon the exercise of a lawful discretion is not reviewable on appeal.

3. **Same—Consent Reference—Consent of Parties—Power of Courts—Jurisdiction.**

   Neither party to a consent reference can withdraw therefrom, and it cannot be set aside except by mutual consent, or by the court, retaining jurisdiction, for good cause shown.

4. **Reference—Set Aside—"Good Cause Shown"—Appeal and Error.**

   The judge, by finding as a fact that one who was a necessary party to be bound had not consented to the reference, and that the objecting party had therein been misled, establishes a "good cause shown," and his action in setting aside the former order and report of the referee thereon is not error.

APPEAL from *Lane, J.*, at July Term, 1911, of BUNCOMBE.

This action was commenced on 16 November, 1903, and the complaint is as follows:

"1. That on 1 April, 1902, the plaintiff executed to the defendant a certain deed conveying to the said J. N. Russell a certain tract of land containing about 325 acres, situate in Limestone Township, Buncombe County, North Carolina, bounded on one side by the French Broad River, the same being fully described in the deed aforesaid, which is duly registered on page 507 of Book No. 123 in the office of Register of Deeds of Buncombe County.

"2. That the said deed was intended by the plaintiff and by the defendant to operate only as a deed in trust, and was accepted by the said defendant as such, and the plaintiff alleges that such was the only effect thereof.

"3. That the trusts upon which the said defendant accepted said conveyance were set out in an instrument of writing executed by the said J. N. Russell simultaneously with the execution of said deed in trust; that the original of said paper-writing was left with J. McD. Whitson, now deceased, who was plaintiff's attorney in that transaction, and plaintiff has diligently searched for said instrument among the papers of the said J. McD. Whitson in the hands of his administrator and elsewhere, and has been unable to find said paper, and therefore plaintiff is unable to attach a copy thereof to his complaint; but as plaintiff is informed and believes, the defendant has a copy of the same.

"4. That at the time of execution of said deed in trust plaintiff was indebted to defendant in the sum of about $800 or $900, the exact amount being undetermined at that time, and the plaintiff, being desirous of securing to the defendant the payment of said indebtedness, executed the said deed in trust, with the agreement that the said defendant should sell said land at a fair valuation and from the proceeds of such sale pay off plaintiff's indebtedness to the defendant, and pay any overplus to the plaintiff, it being expressly understood and agreed between plaintiff and defendant that defendant should not sell said land for less than its real value, nor without the consent and approval of the plaintiff as to the price.

"5. That afterwards, to wit, on 17 June, 1903, the defendant undertook to convey and did execute what purported to be a deed conveying to one H. T. Brown, at the price of $3,500, the said land.

"6. That according to plaintiff's best knowledge and belief, and he so avers the fact to be, the said land is worth the sum of $16,250, and the sum of $3,500 was a grossly inadequate price for said land, as the defendant then and there well knew.

"7. That said alleged sale by the said defendant to the said H. T. Brown was made against the protest of the plaintiff.

"8. That the defendant by said alleged sale of said land grossly abused his trust, and thereby damaged the plaintiff to the extent of $12,750.

"9. That the said H. T. Brown has instituted suit in the Superior Court of Buncombe County against J. W. Ducker, plaintiff's tenant, for the possession of said land, claiming to own the same in fee simple by virtue of said alleged deed executed by the defendant as aforesaid.

"10. That the defendant, J. N. Russell, has not accounted to the plaintiff for the proceeds of said alleged sale of said land or paid plaintiff anything on the account of such alleged sale.

"Wherefore plaintiff prays the court that the defendant be required to account to the plaintiff for the full value of said land, and pay to the plaintiff the sum of $16,250 damage, caused by the abuse of his trust as hereinbefore alleged; for the costs of the action, and for such other and further relief as the nature and circumstances of the case will allow, or to the court may seem meet."

An answer was filed by the defendant, and at September Term, 1907, the following entry appears on the minute docket: "By mutual agreement, this case is referred to Gallatin Roberts, to take and state an account between the various parties."

The referee filed his report at May Term, 1909, to which the plaintiff excepted, and at July Term, 1911, the judge presiding made the following order, setting aside the report and the order of reference:

"This cause coming on to be heard upon the motion of F. A. Lance, plaintiff, to set aside the order of reference heretofore made in said cause, and upon the motion of John N. Russell, the defendant therein, to confirm the report of Gallatin Roberts, referee, heretofore appointed in said cause, the court finds the following facts:

"1. That the said report was made in pursuance of the following agreement:

" 'The defendant, J. N. Russell, comes into court at this stage of the trial and agrees that the suit of H. T. Brown against J. H. Ducker, and the suit of F. A. Lance against J. N. Russell, may be consolidated for the purpose of this consent decree, which proposition is as follows:

"'That a decree may be entered in the case so consolidated, directing H. T. Brown to convey in fee simple to the plaintiff, F. A. Lance, the land in controversy in the action between H. T. Brown and J. W. Ducker, according to the metes and bounds described in the deed made from F. A. Lance to J. N. Russell, as set forth in the complaint, and that F. A. Lance shall pay off and discharge all of the indebtedness included in the trust agreement marked "Exhibit A," as provided for in that instrument, according to the terms and tenor thereof, together with interest lawfully incident to the said indebtedness, and that a referee be appointed by this Court, under a consent decree, to state an account between the plaintiff, F. A. Lance, and the defendant J. N. Russell and H. T. Brown, and to ascertain what, if anything, is due and owing to the plaintiff, F. A. Lance, by reason of the rents and profits for which the defendant J. N. Russell or H. T. Brown, or either of them, by reason of any possession or occupation had and exercised by either J. N. Russell or H. T. Brown, or their tenants, over the land, or any part of the same, in controversy, and for the purpose of such accounting the defendant J. N. Russell and H. T. Brown, or both of them, shall be held accountable for the fair and reasonable rental value of the land in controversy, which the referee may determine the said J. N. Russell and H. T. Brown, or their tenants, to have been in the actual possession of.

"'That it shall be decreed that this conveyance shall be made by H. T. Brown to F. A. Lance of any and all amounts of money payable by him under the terms of this agreement. That each side shall pay their own costs, and the court costs shall be divided equally between J. N. Russell and F. A. Lance, and that Gallatin Roberts, Esq., be appointed referee to state the account between F. A. Lance and J. N. Russell, and that the said referee shall report within......days from date. That the plaintiff, F. A. Lance, shall have ninety days from the time of the filing of his report by the referee in which to pay off the indebtedness upon the land in controversy.'

"2. That the said Hugh T. Brown mentioned in said order did not consent to said order, and did not in any way become a party to said reference, and is not bound by any of the findings of said referee; that the plaintiff, F. A. Lance, entered into said agreement to refer with the full understanding that the said Hugh T. Brown was a party to such reference, and would not have entered into such agreement but for such understanding; that the said Lance believed, and had reason to believe, that said Brown was a party to such reference; that the said reference without such Brown being a party thereto was prejudicial to the rights of the plaintiff, F. A. Lance; and that the plaintiff should not be and is not bound by such reference or by the findings of the referee.

"3. The court further finds as a fact, it being admitted by the parties, that after the filing of the report of Gallatin Roberts, the said referee, that the said Hugh T. Brown tendered a fee-simple deed to the said land to F. A. Lance, which offer has been continued:

"It is, therefore, upon motion of counsel for the plaintiff, considered, ordered, and adjudged that the said report be not confirmed; that the said order of reference be set aside, and that the said cause stand for trial in its order on the civil-issue docket of the Superior Court of Buncombe County."

The defendant excepted to this order, and appealed.

H. T. Brown has not been made a party to this action.

The defendant also moves in this Court to dismiss the action for that the complaint does not state facts sufficient to constitute a cause of action.

Locke Craig and H. B. Carter for plaintiff.
W. W. Jones and Charles E. Jones for defendant.

ALLEN, J. The motion to dismiss the action upon the ground that the complaint is insufficient is based upon the allegations contained in the ninth paragraph of the complaint, the defendant contending that it is there in substance alleged that the plaintiff is resisting a recovery of possession of the land, conveyed by the defendant to H. T. Brown, and if so, that he is not entitled to an account of the purchase money.

The allegations of the complaint do not, however, go as far as the defendant insists. It is not alleged that the plaintiff is a party to the action instituted against Ducker, or that there has been any refusal to surrender possession, or that any defense has been entered in the action. But if these allegations were present, we think a fair construction of the complaint is that the plaintiff, being indebted to the defendant in the sum of $800 or $900, conveyed to him the land in controversy, and that there was a contemporaneous agreement, which was not registered, that the defendant should sell the land, subject to the approval of the plaintiff, and out of the proceeds of sale pay off the debt to the defendant, and pay any surplus to the plaintiff; that the defendant violated his agreement and sold the land to H. T. Brown, without the approval of the plaintiff, for much less than its real value; that the said Brown has instituted an action against the tenant of the plaintiff to recover possession of the land, and that the defendant has refused to account to the plaintiff for the value of the land or for the proceeds of the sale to Brown.

Under these allegations, Brown acquired title to the land, and the only redress for the plaintiff is against the defendant in this action.

The case rests largely on the principles declared in *Sprinkle v. Wellborn,* 140 N. C., 178, and, in our opinion, a cause of action is stated in the complaint.

The remaining question is as to the power of the judge to set aside the order of reference and the report of the referee.

If it was within his discretion, we have no right to interfere with its lawful exercise.

The authorities seem to be uniform that neither party can withdraw from a consent reference, and that it cannot be set aside except by mutual consent, but that the court retains jurisdiction and may, for good cause shown, set aside the order of reference as well as the report. *Bushee v. Surles,* 79 N. C., 53; *Patrick v. R. R.,* 101 N. C., 604; *Smith v. Hicks,* 108 N. C., 251; *Cummings v. Swepson,* 124 N. C., 584; *Brockett v. Gilliam,* 125 N. C., 382.

The judge, in effect, finds as a fact that the plaintiff was misled, and that he consented to the reference because it was represented that H. T. Brown was a party to the agreement and would be bound by it, when in fact no one had authority to represent him, which is, we think, "good cause shown."

In *Kerr v. Hicks,* 131 N. C., 90, a consent order of reference was modified and made compulsory upon a finding by the court that one of the parties excepted at the time the order was made, and if this can be done, there is no reason for denying the power to set aside the order altogether, if one party is misled by the other, and thereby induced to agree to the reference.

We find no error.

Affirmed.

CHARLES BRAZILLE v. CAROLINA BARYTES COMPANY.

(Filed 20 December, 1911.)

1. **Damages—Release—Mental Incapacity—Evidence—Husband and Wife.**

   To set aside a release for damages for personal injuries received, on the ground that the plaintiff was suffering severely from the effects of his injury at the time of its execution and did not have sufficient mental capacity, it is competent for his wife to testify as to his mental incapacity then.

2. **Master and Servant—Dangerous Instrumentalities—Safe Place to Work—Appliances—Evidence—Nonsuit.**

   Upon evidence tending to show that the plaintiff, an uninstructed and inexperienced man, was injured while blasting with dynamite in the employment of the defendant, using an iron tamping rod furnished him and the other employees, which resulted in the explosion causing the injury, a motion to nonsuit should be denied.

3. **Damages—Release—Mental Incapacity—Pleadings—Sanity—Evidence—Estoppel.**

   In an action for damages for a personal injury alleged to have been caused by the negligence of the defendant, the plaintiff sought to set aside a release from further liability, on the ground of his mental incapacity, caused by the injury, at the time of executing the release: *Held,* it was unnecessary for plaintiff to allege and prove sanity since that time to maintain his action, and the doctrine of estoppel would rather apply to defendant, who alleged his sanity at the time of the release.

4. **Negligence—Instructions—Confusing—Appeal and Error.**

   When damages are sought for a personal injury alleged to have been negligently inflicted, a request for special instruction on the question of contributory negligence is confusing and should be refused, which directs an affirmative answer, if the jury found as a fact that the plaintiff "was negligent in any degree."

5. **Master and Servant—Dangerous Instrumentalities—Instructing Servant—Negligence—Evidence—Instructions.**

Upon the evidence in this case tending to show that plaintiff, an inexperienced man, was employed without instruction to blast with dynamite, using an iron tamping rod furnished him for the purpose, which caused the explosion inflicting the injury complained of: *Held*, not error to refuse a request for instruction, that if the jury believed the evidence to answer in the affirmative the issue of contributory negligence.

6. **Release—Fraud—Evidence.**

Held, evidence sufficient to be submitted to the jury upon the issue of defendant's fraud in obtaining a release for personal injuries alleged to have negligently been inflicted on the plaintiff, which tends to show that the plaintiff signed the release while greatly suffering from the injury, just after he had left the hospital where he had been for treatment; that his wife and brother were excluded from the room at the time; that he was ignorant and humble, unable to read and write; that he was without advice and counsel of friends, and thought he was signing a receipt for his wages; that the consideration was grossly inadequate.

7. **Master and Servant—Dangerous instrumentalities—Contributory Negligence—Assumption of Risks—Burden of Proof—Evidence.**

An inexperienced servant was employed to blast with dynamite, and furnished with iron tamping rods for the purpose, the evidence tending to show that the use of these tamping rods caused the explosion causing the injury complained of. A charge *Held* correct, that "Unless the jury find by the greater weight of the evidence that the plaintiff knew of the great danger in using iron tamping rods, and voluntarily and willingly made up his mind to run the great risk incident to using the same, you will answer the issue 'No,'" and that recovery would not be denied unless in the use of the tamping rod the apparent danger was so great that its assumption would amount to a reckless indifference to probable consequences.

8. **Master and Servant—Dangerous Instrumentalities—Assumption of Risks—Evidence.**

The servant assumes the risks ordinarily incident to his employment, but does not assume the risk from dangers which arise from the failure of the master to furnish reasonably safe and suitable tools with which to do the work required of him, unless in the careful performance of the work with the tools furnished the inherent probabilities of injury are greater than those of safety.

9. Instructions—How Construed—Appeal and Error.

When, construed as a whole, the charge of the trial judge is correct, a fragmentary part objected to will not be held reversible error.

10. Appeal and Error—Stenographer's Notes—Contentions—Immaterial Matter—Costs.

When, at the instance of a party, the trial judge sends up on appeal the contentions of the parties, not needed to enlighten the Court, and puts in a large part of the testimony in the form of stenographer's notes instead of in narrative form, which was excepted to, the unnecessary matter will be estimated and taxed against the party at whose instance they were incorporated into the record on appeal.

APPEAL by defendant from *Lane, J.*, at October Term, 1911, of MADISON.

Guy V. Roberts, W. W. Zachary, and Moore & Rollins for plaintiff.

Martin & Wright for defendant.

CLARK, C. J. This is an action to recover damages for personal injuries. The plaintiff alleges that the company furnished him and other employees iron tamping rods to be used in tamping dynamite, and while so being used the iron tamping rods caused an explosion which seriously and permanently injured the plaintiff. He further alleges that in a few days after his return from the hospital, and while blind, and suffering in mind and body from said injuries, and mentally incompetent and incapable of transacting any business, the defendant company by fraud and false representation secured his signature to an alleged release. The defendant denied that the release was procured by fraud and alleged that the plaintiff was competent to transact business at the time it was signed. There was evidence that the plaintiff was an inexperienced miner and did not know the danger of using the iron tamping rods; that the defendant knew that it was highly dangerous to allow its employees to use them, but decided to take the risk, as the company could get along faster and do more work. The jury found in response to the thirteen issues submitted to it that the plaintiff was injured by the negligence of the defendant company; that he was not guilty of contributory negligence; that he did not assume the risk; that he was not injured by the negligence of a fellow-servant; that the plaintiff did not have sufficient mental capacity to execute the release; that the defendant had knowledge of plaintiff's mental incapacity; that the release was obtained by fraud and fraudulent representation, and that the amount ($372) paid the plaintiff at the time he signed the release was not a fair and reasonable consideration, and assessed the plaintiff's damages at $4,850.

The first exception is because the plaintiff's wife was allowed to testify as to his mental incapacity the day he signed the release. This was competent. *Stewart v. Stewart,* 155 N. C., 341; *Clary v. Clary,* 24 N. C., 78; *Whitaker v. Hamilton,* 126 N. C., 466; *Horah v. Knox,* 87 N. C., 485; *Bost v. Bost, ib.,* 479.

Exception 2, for refusal of the motion to nonsuit, cannot be sustained. Exception 3 is because the court did not set aside the verdict, upon the motion of the defendant, on the ground that the jury having found the plaintiff mentally incompetent when he signed the release, and he having failed to allege and prove sanity since, he could not bring this action. If there was estoppel it was fully as much upon the defendant, who had alleged in its answer that the plaintiff had mental capacity. It is true, the jury found that the plaintiff was incompetent to sign the release 23 December, 1909, by reason of his physical and mental suffering at that time caused by his injuries, but there was no presumption that such suffering with the consequent mental and physical inability to attend to business continued down to the time of the trial, in October, 1911. Exception 4 was because the court signed judgment upon the verdict.

Exception 5 is because the court refused to instruct the jury that if "the plaintiff was negligent in any degree, and this was the proximate cause of his injury, they will answer the tenth issue 'Yes.'" An instruction that if the plaintiff was "negligent in any degree" would simply confuse the jury, and has been condemned in another case at this term. Beach Con. Neg., secs. 21-26; Thompson Negligence, secs. 170, 171, 172, and 267; 7 A. and E. Enc., 383. The court properly refused to instruct the jury that if they believed the evidence to answer the tenth issue "Yes," and also in refusing to instruct the jury to make the same response if the plaintiff knew the danger of using an iron tamping rod. These are the 6th and 7th exceptions. In lieu of them the instruction of the court on these propositions was in accordance with our precedents.

The 8th, 12th, and 13th exceptions are because the court refused to instruct the jury to answer the issue as to fraud in obtaining the release in the negative. There was evidence tending to show fraud which was sufficient, if believed by the jury, to justify the finding of the issue in the affirmative. Among them was the evidence that the plaintiff's wife and brother were not permitted to be present in the office when the release was signed, but were left outside in the cold; that the release was executed in a few days after the plaintiff left the hospital, and while he was suffering great pain and mental anxiety occasioned by his injuries; that plaintiff was ignorant and unable to write, blind, and his hearing badly impaired; that, as he testified, he thought that he was giving a receipt for wages; that he had no friends or counsel to advise him; that the consideration paid was $372, whereas the jury found that $4,850 was reasonable and just compensation. These and other circumstances were sufficient to carry the case to the jury and justify its finding. *Hayes v. R. R.*, 143 N. C., 128; *Dorsett v. Manufacturing Co.*, 131 N. C., 259; *Bean v. R. R.*, 107 N. C., 746.

The 9th exception is because the court modified an instruction asked by the defendant, that if the accident was caused by the manner in which the hole was loaded, to answer the issue as to the defendant's negligence "No," by adding: "If this was not a reasonably safe way of loading a hole."

Exception 10 is because the court instructed the jury "that it was the duty of the employers to instruct their employees in the use of dangerous machinery or dynamite before assigning them to such duty." This instruction was proper. *Horne v. R. R.*, 153 N. C., 239. Exception 11 was on substantially the same grounds.

Exception 14 is because the court charged the jury that if they found that the consideration paid for the release was grossly inadequate, that this was a circumstance which they could consider in passing upon the fourth issue, as to fraud in procuring the release. This charge was in accordance with *Dorsett v. Manufacturing Co.,* 131 N. C., 259.

Exception 15 is because the court charged the jury, "That unless you find by the greater weight of the evidence that the plaintiff knew of the great danger in using iron tamping rods, and voluntarily and willingly made up his mind to run the great risk incident to using the same, then you should answer the twelfth issue 'No.'" This charge is in accordance with *Hicks v. Manufacturing Co.,* 138 N. C., 320; *Lloyd v. Hanes,* 126 N. C., 359.

Exception 16 is because the court charged the jury "that the use of an iron tamping rod, if it was obviously dangerous, will not prevent the plaintiff from recovering from an injury resulting therefrom unless the apparent danger was so great that its assumption would amount to a reckless indifference to probable consequences." This is practically the language used by the Court in *Coley v. R. R.,* 129 N. C., 411.

Exception 17 is because the court charged "That the servant assumes the risk ordinarily incident to his employment, but he does not assume the risk from dangers which arise from the failure of the master to furnish his servant reasonably safe and suitable tools with which to do the work required of him unless in the careful performance of the work with the tools furnished the inherent probabilities of injury are greater than those of safety." The defendant admits that this language is substantially what was said in *Hicks v. Manufacturing Co.,* 138 N. C., 319.

The 18th and last exception is because the court erred in instructing the jury, "Where the master fails in his duty to the injured servant, this failure is the proximate cause of the injury; the fact that the negligence of a fellow-servant also commingles with it as a proximate cause will not exonerate the master from liability." This exception cannot be sustained. Thompson on Negligence, secs. 4856, 4857, 4858.

This Court said in *Ramsey v. R. R.,* 91 N. C., 418: "The charge of the court, when properly considered as a whole, was in accordance with the principle settled in the cases just cited. We are not permitted to select detached portions of the charge, even if in themselves subject to criticism, and assign errors as to them, when, if considered with the other portions of the charge, they are readily explained and the charge in its entirety appears to be correct. Each portion of the charge must be construed with reference to what precedes and follows it."

The defendant excepted at the time of settling the case on appeal "for that the court, at the instance of the plaintiff, sent up the contentions of the parties as a part of the charge, and put in a large part of the testimony in the form of stenographer's notes, instead of in narrative form." This exception was in accordance with the provisions of Rule 22 of this Court, 140 N. C., 494, and complies with the repeated decisions thereon. *Cressler v. Asheville,* 138 N. C., 482. As there was no point made on the judge's reciting the contention of the parties, and they were not needed to enlighten the Court as to any of the exceptions, it was unnecessary to send them up, and it was also improper to send the stenographer's notes up in the form of question and answer, but the evidence should have been stated in narrative form, as we have so often ruled. The unnecessary matter thus sent up, we estimate at 40 printed pages, the cost of copying and printing which will be taxed against the appellee, as provided in Rule 22. *Land Co. v. Jennett,* 128 N. C., 3.

No error.

GAINESVILLE AND ALACHUA COUNTY HOSPITAL ASSOCIATION v. ATLANTIC COAST LINE RAILWAY COMPANY AND GEORGIA HOBBS.

(Filed 20 December, 1911.)

Appeal and Error—Second Appeal—Motion to Rehear—Procedure.

A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being in the Supreme Court by a motion to rehear.

APPEAL by defendants from *Cline, J.*, at August Term, 1911, of SAMPSON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Faison & Wright for plaintiff.
Junius Davis for defendant.

WALKER, J. An examination of the record in this case discloses the fact that every question now raised was presented in the former appeal and then decided by this Court. If it was material at the former hearing for the plaintiff to have established its incorporation, the nonsuit should have been sustained, and there is no less evidence of that fact now than there was then. But we concur with the judge, who presided at the trial, that the question of incorporation is not sufficiently raised by the pleadings, and, besides, if our former decision was correct, the appellant (railway company) dealt with the plaintiff as if it had been duly incorporated and had the capacity to enter into the contract, whether express or implied. *Bank v. Duffy,* 156 N. C., 83.

The question as to the statute of frauds, and the remaining one as to the authority of H. O. McArthur to act for the company in the particular matter, were both passed upon when the case was here before. The evidence is not substantially different from what it was in the former appeal. We then held that it was sufficient for submission to the jury, and we must so decide now, as the same question cannot be raised by a second appeal, but it must be done by a petition to rehear the case, and for a reversal of our decision, if we were in error. *Jones v. R. R.,* 131 N. C., 133; *Wright v. R. R.,* 128 N. C., 77; *Kramer v. R. R., ibid.,* 269; *Holley v. Smith,* 132 N. C., 36. The motion to nonsuit is governed by the same rule. We do not mean to imply that our former rulings were erroneous, but simply that they cannot be reviewed in this way. There is no practical difference between this case and the one we formerly heard. Assuming that McArthur had sufficient authority to represent defendant, which we formerly decided to exist, the ruling that the promise to pay the plaintiff its charges for medical and other services to Miss Hobbs, as an original one, is not affected by the statute of frauds, and, therefore, is not required to be in writing, finds some support in two cases decided at this term, *Peele v. Powell*, 156 N. C., 553, and *Whitehurst v. Padgett*, *ante*, 424.

No error.

P. W. MICHAEL v. J. O. MOORE AND WIFE.

(Filed 20 December, 1911.)

1. **Debtor and Creditor—Insolvency—Gifts—Improving Property of Another—Equity.**

   An insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims.

2. **Same—Husband and Wife—Contract—Fraud.**

   The right of the creditors of an insolvent husband to follow his funds used in making improvements upon his wife's lands is an equitable one, and does not rest on contract, and the money so invested is regarded as a "personal fund fraudulently withdrawn from the husband's creditors."

3. **Debtor and Creditor—Insolvency—Gifts—Husband and Wife—Improving Wife's Property—Fraudulent Purpose—Intent—Equity.**

   The funds of an insolvent husband invested in improvements on his wife's lands, in fraud of his creditors, is not regarded in equity as being a part of his wife's property, and may be subjected by the creditors to the payment of their debts, though the husband may not have intended to defraud them, or the wife may not have known of or participated therein, if he had such intention.

4. **Debtor and Creditor—Fraud—Husband and Wife—Improving the Wife's Property—Resulting Trusts.**

   An insolvent husband who has put improvements on his wife's land in fraud of his creditors has no resulting trust in the land of his wife for the value of the improvement, the equity being only in favor of his creditors, who have the right to follow the fund invested for the satisfaction of their debts.

5. **Execution—Debtor and Creditor—Fraud—Improving Wife's Property—Personal Property Exemption.**

When an insolvent debtor has, in fraud of the rights of his creditors, invested his money in improvements on his wife's lands, and such has been established in a suit by his creditors, the debtor may claim his personal property exemption from the money so invested; and when the pleadings raise this issue, the amount of the personal property exemption must first be deducted from the amount expended in making the improvements, and the clear balance will be the basis for the estimate of the amount subject to the satisfaction of debts. Whether the creditors can recover the entire sum wrongfully used in improving the property, less the exemption, or only the amount by which the property is enhanced in value, *quære.*

6. **Same—Appeal and Error—Pleadings—Reformation—Issues—Procedure.**

It appearing in this suit that the creditors of an insolvent defendant are entitled to have improvements put upon his wife's land with his funds subjected to the payment of their debts, from which the debtor may claim his personal property exemption were the pleadings properly drawn to present the issue, the case is remanded with direction to reform the pleadings in accordance with the principles declared, and to submit issues for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and, also, the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary.

APPEAL from *Long, J.,* at May Term, 1911, of CATAWBA.

The plaintiff, at May Term, 1908, of Catawba Superior Court, obtained a judgment against J. O. Moore, one of the defendants, for $300 and costs in a suit for damages for malicious prosecution. At the time the judgment was taken the defendant J. O. Moore owned a tract of land in Alexander County. He gave notice of appeal from the said judgment to this Court, being allowed time within which to perfect such appeal, which appeal was not, in fact, prosecuted. Before the time for perfecting said appeal had expired, and before the plaintiff caused a transcript of said judgment to be docketed in Alexander County, the defendant J. O. Moore, his wife, Dora Moore, joining him, executed a mortgage on the land in Alexander County to secure the payment of $2,000 borrowed from the mortgagee. The defendants, with the $2,000 so borrowed, erected a residence on a lot in the city of Hickory, the title to which was in the defendant Dora Moore. The *feme* defendant had actual notice of the suit, and of the judgment taken therein, before the execution of the mortgage and the use of the $2,000 in the erection of the dwelling-house on her lot. At the time of the transaction the defendant J. O. Moore was insolvent. After plaintiff had exhausted his legal remedies by execution and supplemental proceedings, he instituted this proceeding for equitable relief.

The jury returned the following verdict:

1. Did defendant J. O. Moore dispose of all of the lands owned by him, and expend the bulk of the proceeds therefrom in the erection of permanent improvements on lands of the defendant Dora Moore, for the purpose of defeating or delaying or defrauding the payment of the plaintiff's judgment against him, referred to in the complaint? Answer: No.

2. If so, did the defendant Dora Moore have knowledge of such purpose on the part of her husband, and participate in the alleged fraud of her husband, as set out in the first issue? Answer: No.

3. What is the value of the lot of land owned by Dora Moore, independent of the improvement placed on it by the money of her husband? Answer: $600.

4. What amount of money of J. O. Moore, referred to in the first issue, was expended upon the lot of Dora Moore with her consent? Answer: About $2,000.

Upon the verdict, the court rendered the following judgment:

"This cause coming on before the undersigned and a jury, and the jury having found the third and fourth issues in favor of the plaintiff; and the male defendant, as it appears from the record, being indebted to the plaintiff in the sum of $300 and costs, $48.15: It is, therefore, upon the whole record, considered and adjudged that the plaintiff recover of the defendant J. O. Moore $348.15 and the costs of this suit. It is further considered and adjudged that the value of the lot owned by the defendant Dora Moore, in her own right, independent of the interests of her husband in the house and lot, is $600. It is further considered and adjudged that the interest of the defendant J. O. Moore in the house and lot described in the complaint is $2,000, and that said sum was expended by J. O. Moore on the said lot of his wife, with her consent, in making improvements thereon, from his own moneys, and the said wife holds her said lot subject to the equity in the same of her husband in the sum of $2,000, to be pursued by the plaintiff as he may be advised."

Defendants appealed.

W. A. Self and A. A. Whitener for plaintiff.
Councill & Yount for defendant.

WALKER, J., after stating the case: We entertain no doubt as to the plaintiff's right to follow the fund invested by his debtor in improvements upon his wife's land. No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Guthrie v. Bacon,* 107 N. C., 338, and cases cited; *McGill v. Harmon,* 55 N. C., 179; *Gentry v. Harper,* 55 N. C., 177. The doctrine is well stated and applied in *Burton v. Farinholt,* 86 N. C., 260, by *Justice Ruffin,* as follows: "The life policy in question was the property of the plaintiff's intestate. As soon as delivered, it vested in him, and, like any other chose in action, became an integral part of his estate, subject to every rule of property known to the law. Being indebted, to a state of clear insolvency, at the time of its voluntary assignment to his daughters, his act was fraudulent as to his creditors and void in law, whether made with an intent actually fraudulent or not. It is a principle of the common law as old as the law itself, and upon which the preservation of all property depends, that, except so far as the same may be exempt by positive law, the whole of every man's property shall be devoted to the payment of his debts. He cannot gratuitously give away any part of it, the law meaning that he shall be just to his creditors before he is generous to his family. From the fact that he was at the time insolvent, and that his transfer to his daughters was without valuable consideration, it results, as a conclusion of law, that the assignment was void as to his creditors. As said in *Gentry v. Harper,* 2 Jones Eq., 177, it is against conscience for debtors to attempt in any way to withdraw property or effects from the payment of debts; and if the courts of law cannot reach the debtor's interest, a court of equity will." More apposite is the case of *Pender v. Mallett*, 123 N. C., 57, in which the present *Chief Justice* says: "If she were not a free trader, the action concerns property she claims as her separate property, and she can be sued in regard thereto, no matter when she acquired it, her husband being joined with her as defendant. Code, secs. 178, 424 (4). It cannot be allowed that when an insolvent husband (or his firm, as here charged) makes over his property to his wife in fraud of his creditors, she cannot be sued for the recovery thereof because she is a married woman. If in such case the specific property (money, for instance) has been invested in some other shape the fund may be followed. *Edwards v. Culberson,* 111 N. C., 344, and cases there cited."

It is not necessary to show an actual intent to defraud. The transaction is void *per se.* Revisal, sec. 962; *McCanless v. Flinchum,* 89 N. C., 373. Nor does her coverture protect the *feme* defendant. *Bell v. McJones,* 151 N. C., 85; 2 Pom. Eq. Jur. (3 Ed.), sec. 945. The facts of our case are substantially like those in *Trefethen v. Lynam*, 90 Me., 376 (60 Am. St., 271), and with reference to the transaction in that case, by which the wife's property was improved, the Court said: "The wife cannot rightfully retain, as against her husband's creditors, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions he cannot acquire any property which shall be free from the claims of prior creditors; nor can she acquire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. Under the principles above stated, however, the husband's right is not the test of his prior creditor's right. As to them, neither husband nor wife can erect buildings on her land with his money and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much; but she should not retain any benefit or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained would cause her no loss of her own property, but would simply transmit some part of the husband's property to his creditors—a most equitable proceeding." It is there said by the Court that the principle so stated is fairly deducible from the cases.

Our attention has been called to the case of *Thurber v. LaRoque,* 105 N. C., 301, in which it is held that money of an insolvent husband invested in land, as a gift to his wife, and which is conveyed to her, may be followed by creditors and the land subjected to its payment, but money, when thus invested in improvements on her land, cannot be followed by them, and the latter decision seems to rest upon the idea that the right of the husband's creditors to follow the fund arises out of her implied promise or contract to pay for the improvements. We do not concur in this view. The two cases are affected by the same principle, which has nothing to do with the law of contracts. The creditor's right is an equitable one, and the money so invested, whether in land or improvements, is regarded as "a personal fund fraudulently withdrawn from the husband's creditors," as said by *Justice Shepherd* in his dissenting opinion, which fully and clearly states the true doctrine. The court proceeds to subject the property, which has derived a benefit from the improvement, not upon the theory that the wife has contracted, either expressly or impliedly, to pay for the improvements, but it follows the fund taken from the husband's estate and which justly belonged to the creditors, into her hands and holds the property as security for its repayment, even against her consent. Any other ruling would be entirely opposed to the true principle upon which this equity of the creditors is based, as will appear in the numerous decisions of this Court, some of which we have cited. If a husband is permitted thus to dispose of his estate and without any accountability on the part of the wife to them, it would enable him to commit the most gigantic frauds in defiance of his creditors. The law cannot be supposed to have contemplated any such result in its attempts to protect the wife against the consequences of her improvident contracts. The general doctrine is nowhere better stated than in Perry on Trusts (5 Ed.), sec. 170: "Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus, at law, married women or infants are not liable upon their contracts. But in equity, if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women, and converts her by construction into a trustee, and compels her to do justice by executing the trust."

We need not agree to all that is said in the passage just quoted for the purpose of disposing of this case, as there is no element of contract in the equity which we are now enforcing.

The suit is for the purpose of recovering the husband's assets which should be devoted to the payment of his debts, and not the wife's. It would be against good conscience for her to retain the benefit accruing from his fraudulent act and not pay for it. It is not her property, but justly belongs to his creditors. There is no injustice or wrong in taking from her that which she does not own, as against the creditors, and restoring it to them. It is said in *Wall v. Fairley,* 73 N. C., 464: "It does not follow that the creditors cannot follow the funds of the debtor in the hands of his voluntary, and, therefore, in law, fraudulent donee. It is settled that in the case of a fraudulent donation, such as this appears to have been, they can do so," and this must be true, without there being any implied promise to pay for the benefit that may have been derived from the improvement.

But in order to ascertain what the benefit is, the personal property exempted ($500) must first be deducted from the amount expended in making the improvement, and the clear balance will be the basis for the estimate. We need not decide whether the creditors can recover the entire sum wrongfully used in improving the property, less the exemption, or only the amount by which the property is enhanced in value, as it may not be necessary to do so. We are satisfied that, to the extent the property has been substantially benefited or increased in value by the improvement, the creditors are entitled to subject it to the satisfaction of their claims. The pleadings are not framed, nor were the issues, so as to allow to the debtor the benefit of his personal property exemption by deducting $500 from the amount put into the improvements. His creditors could not have reached this, if he had retained the money, and, therefore, are not entitled to have it considered in ascertaining the increased value of the land by reason of the improvement. The judgment as rendered is incomplete, in any view of the case, as it requires nothing to be done, but merely declares the right of the husband, and erroneously too, as he has acquired no equity in the property because of its improvement with his money. The transaction is valid as between him and his wife, and thus considered, she is entitled to the benefit of the improvement, there being no resulting trust in such a case. It is the creditors who have the only equity and can follow the fund.

The case is remanded, with direction to reform the pleadings in accordance with the principles declared in this opinion. Issues should be submitted for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and also the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary.

New trial.

W. E. BATEMAN v. E. B. HOPKINS.

(Filed 20 December, 1911.)

1. **Statute of Frauds—Contracts to Convey Lands—Memorandum—Writing Sufficient.**

   A memorandum held a sufficient contract to convey lands under the statute of frauds, reading as follows: "Received of B. $5 to confirm the bargain on the purchase of the farm on which I now live," dated and signed by the vendor.

2. **Statute of Frauds—Contracts to Convey Lands—Description—Identification of Lands.**

   A description of lands, the subject-matter of a contract to convey, as "the farm on which I now live": *Held,* to be sufficiently defined to enforce specific performance upon the identification of the *locus in quo.*

3. **Same—Consideration—Parol Evidence.**

   The consideration for the lands contracted to be conveyed need not be expressed in the written memorandum or contract required by the statute of frauds, and may be shown by oral evidence.

4. **Statute of Frauds—Contract to Convey Lands—Vendor and Vendee—Consideration.**

   In an action by the vendee against the vendor for specific performance of a contract to convey lands, it is not necessary that the written memorandum required by the statute of frauds set forth the obligation of the vendee to pay the purchase price, for by bringing his action the vendee agrees to perform the contract irrespective of the statute of frauds. It is only necessary that the memorandum be signed by the party to be charged, who is the defendant in this case.

5. Statute of Frauds—Contracts to Convey Lands—Specific Performance—Purchase Money—Tender—"Ready, Able, and Willing."

In an action to enforce against a vendor specific performance of his contract to convey lands, which he seeks to avoid upon the ground that it is unenforcible under the statute of frauds, it is not required, to maintain the action, that the plaintiff show a tender of the purchase price before commencing his action or for him to pay it into court; for it is sufficient if he has ever been ready, able, and willing to comply, on his part, with the terms and conditions which the contract imposes on him.

6. Same—Reasonable Time Decreed.

When specific performance of a contract is enforcible against the vendor of lands in the suit of the vendee, equity, looking to the adjustment of the rights of the parties, may decree that the plaintiff pay the purchase money into the court and otherwise comply with his contract, within a reasonable time, to be fixed by the court, and upon his failure to do so, his right to specific performance be denied and the action dismissed, and that if he does perform, on or before the last day named, the defendant execute a good and sufficient deed for the premises, properly acknowledged or proven, and deposit it with the clerk of the court, at a time to be named, to be delivered to the plaintiff, and when this is done, the money so deposited in court to be paid to the defendant.

7. Same—Appeal and Error—Notification in Decree—Costs.

When the trial court decrees that the vendor of lands make deed to the vendee and file it with the clerk of the court, and that the vendee pay into court the purchase money, without fixing a time in which it is to be done, in an action for specific performance of a contract this Court will direct, when it appears that it should be done, that the order be modified by the lower court so that such reasonable time be specified.

APPEAL from *O. H. Allen, J.*, at Spring Term, 1911, of TYRRELL.

This action was brought to compel the specific performance of a contract to convey land, by the vendee against the vendor. The memorandum is as follows:

Received of W. E. Bateman $5, to confirm the bargain on the purchase of the farm on which I now live. This 8 January, 1910. (Signed) E. B. HOPKINS.

The defendant alleged that the memorandum was as follows: "Received of W. E. Bateman $5, to confirm the bargain on the purchase of the farm on which I now live, and if I fail to make the said W. E. Bateman a deed, then I will pay his $5 back and $5 more, making in all $10."

The jury returned the following verdict:

1. Did the defendant execute the contract set out in the complaint? Answer: Yes.

2. Did the plaintiff Bateman tender the defendant Hopkins the $1,000, part purchase money of the lands described in the complaint? Answer: No.

3. If not, was it waived by defendant Hopkins? Answer: Yes.

4. Was the plaintiff Bateman ready, willing, and able to pay off the indebtedness of said Hopkins to J. C. Meekins, Sr., and to pay the defendant Hopkins, in addition, the $1,000 balance of the purchase money? Answer: Yes.

5. What is the yearly rental value of the same? Answer: $150.

The court, after refusing a new trial, rendered judgment upon the verdict for the plaintiff, and defendant appealed.

W. M. Bond, I. M. Meekins, and M. H. Tillett for plaintiff.
M. Majette and E. F. Aydlett for defendant.

WALKER, J. It will be seen that upon the issue as to the contents of the memorandum the jury decided in favor of the plaintiff, and we must, therefore, consider the case with reference to the contract as it is alleged in the complaint. We do not entertain any doubt as to the sufficiency of the memorandum under the statute of frauds, as it has been construed in our decisions. "Every deed of conveyance (or contract) must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers." *Gaston, J.*, in *Massey v. Belisle*, 24 N. C., 170. In *Carson v. Ray*, 52 N. C., 609, the deed described the land as "My house and lot in the town of Jefferson, Ashe County, N. C.," and the Court, with reference to this description, said: "A house and lot, or *one* house and lot in a particular town, would not do, because too indefinite on the face of the instrument itself. See *Plummer v. Owens,* Busb. Eq., 254; *Murdock v. Anderson,* 4 Jones' Eq., 77. But 'my house and lot' imports a particular house and lot, rendered certain by the description that it is one which belongs to me, and upon the face of the instrument is quite as definite as if it had been described as the house and lot in which I now live, which is undoubtedly good." See *Blow v. Vaughan,* 105 N. C., 199; *Farmer v. Batts,* 83 N. C., 387. To the same effect is the language of the Court in *Manufacturing Co. v. Hendricks,* 106 N. C., 485: "No decree, however, for specific performance can be granted the defendant unless 'his land where he now lives' (the descriptive words of the receipt) is fully identified by competent testimony. These words are clearly susceptible of being applied to a particular well-defined tract of land—*id certum est, quod certum reddi potest*—and if the defendant can supply the requisite proof, he will be entitled to relief."

It is further objected that the consideration is not expressed in the memorandum, but it is well settled that this is not required, and it may be shown by oral evidence. *Miller v. Irvine,* 18 N. C., 103; *Thornburg v. Masten,* 88 N. C., 293; *Manufacturing Co. v. Hendricks, supra; Hall v. Misenheimer,* 137 N. C., 183. In *Gordon v. Collett,* 102 N. C., 532, a simple receipt of a sum of money, in part payment of a certain tract of land described in the paper, was held to be sufficient. There was evidence in the case identifying the land and fixing the amount of the consideration. This action is by the vendee against the vendor. It was not necessary, therefore, for the memorandum to set forth the obligation of the vendee to pay the price. There is a difference, as we have often said, between the consideration necessary to support a contract, which was required at common law before the statute of frauds was adopted and is still required, and the promise of the vendee to pay the purchase money, which must be stated in the writing in order to bind him, if he is sued and is, therefore, the party to be charged. *Hall v. Misenheimer, supra; Brown v. Hobbs,* 154 N. C., 544. "Under the statute of frauds a contract, in writing, to sell land, signed by the vendor is good against him, although the correlative obligation of the buyer to pay the price is not in writing, and cannot be enforced against him." *Mizzell v. Burnett,* 49 N. C., 249. See, also, *Improvement Co. v. Guthrie,* 116 N. C., 382. As the vendee is suing in this case, he agrees to perform the contract and therefore waives the benefit of the statute or rather is not seeking to rely upon it.

The overshadowing question in this case is whether the plaintiff has made a proper tender or been relieved therefrom by the conduct of the defendant, and if so relieved, whether he has been ready, willing, and able to perform his part of the contract. As to the first question, the jury have found, upon sufficient evidence, as we think, that the defendant waived a tender of the purchase price by the plaintiff, not only by his conduct, but by denying the contract and refusing to comply with its terms. The denial and refusal continued to the very time of the trial. The court did not order a sale of the land, but required the defendant to execute a deed for the same and deposit it with the clerk of the court, and the latter to deliver it to the plaintiff upon his paying into court the money due under the contract and otherwise complying fully with its terms and conditions on his part. Where the vendor has repudiated the agreement, thus making it appear that if the tender were made, its acceptance would be refused, tender or offer of payment by the vendee before suit is unnecessary. Equity does not require a useless formality. 36 Cyc., 705. In general, the rules of equity concerning the necessity of an actual tender are not so stringent as those of the law. The following are special rules upon the subject, which seem to be settled:

"1. An actual tender by the plaintiff is unnecessary when, from the acts of the defendant or from the situation of the property, it would be wholly nugatory. Thus, if defendant has openly refused to perform, the plaintiff need not make a tender or demand; it is enough that he is ready and willing and offers to perform in his pleading. *Hunter v. Daniel,* 4 Hare, 420, 433; *Mattocks v. Young,* 66 Me., 459, 467; *Crary v. Smith,* 2 N. Y., 60, 65; *Kerr v. Purdy,* 50 Barb., 24; *Maxwell v. Pittinger,* 3 N. J. Eq., 156; *White v. Dobson,* 17 Gratt., 262; *Brock v. Hidy,* 13 Ohio St., 306, 310; *Brown v. Eaton,* 21 Minn., 409, 411; *Gill v. Newell,* 13 Minn., 462, 472; *Diechmann v. Diechmann,* 49 Mo., 107; *Gray v. Dougherty,* 25 Cal., 266, 280, 281.

"2. Where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price—an actual tender and demand by one party is necessary to put the other in default, and to cut off *his* right to treat the contract as still subsisting. *Hubbell v. Von Schoening,* 49 N. Y., 326, 331; *Leaird v. Smith,* 44 N. Y., 618; *Van Campen v. Knight,* 63 Barb., 205; *Irvin v. Bleakley,* 67 Pa. St., 24, 28; *Crabtree v. Levings,* 53 Ill., 526."

Where time is essential or of the essence of the contract, the tender and demand must be made on the day named, and *a fortiori* where it is stipulated that if tender and demand are not made by one of the parties at the time specified, the other party may treat the contract as at an end.

When time is not essential, another rule has been adopted in a group of decisions, which is said to be more in accordance with principles of equity, viz., that in such contracts an actual tender or demand by the plaintiff prior to the suit is not essential. It is enough that he was ready and willing, and offered, at the time specified, and even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by laches, and that he offers to perform in his pleading. The plaintiff's performance will be provided for in the decree, and his previous neglect will only affect his right to costs.

The foregoing principles are considered in 4 Pomeroy's Eq. Jur. (3 Ed.), sec. 1407, and note, at p. 2776, where a full citation of the authorities will be found. See, also, Pomeroy on Contracts, secs. 360 to 364. The general rule is thus stated by Pomeroy in section 1407: "The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms."

But in this case the tender of the money was waived by the defendant, and the jury have found that the plaintiff was ready, able, and willing to comply with his part of the contract. If he was not, in the sense that he did not have the money under his control and within his reach, so that he could put his hands on it and pay it over to the defendant at any moment, the defendant has not put him in default by tendering a deed for the land, thus "cutting off plaintiff's right to treat the contract as still existing," as said above. How can the defendant be hurt, in that respect, by the judgment of the court? The payment of the money is assured, for the plaintiff must pay it into court before he is entitled to receive the deed. This subject was fully discussed in *Harris v. Greenleaf,* 117 Ky., 817, and also reported, with an elaborate and useful note, in 4 Am. and Eng. Anno. Cases, at p. 849. The Court there held that it was not necessary to allege a tender or to bring the money into court upon filing the bill, and said: "In *Hunter v. Daniel,* 4 Hare, 420, a case very much like this one, in lacking a tender by the plaintiff before suit brought for specific performance, the argument was submitted that payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The Court responded: "The general rule in equity certainly is not of that strict character. A party filing a suit submits to do everything that is required of him, and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money?" The same ruling was made in *Webster v. French,* 11 Ill., 254, where the Court said: "The result of my examination of this subject clearly shows that the court of chancery is not bound down by any fixed rule on this subject, by which it will allow the substantial ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but the merest technicality could require. The money may, at any time, be ordered to be brought into court, whenever the rights of the opposite party may require it; but while he is insisting that the money is not his, and that he is not bound to accept it, it would seem to be a matter of no great consequence to him whether it is in the custody of the court or not. The court possesses a liberal and enlarged discretion on this subject, by the proper exercise of which the rights of all parties may be protected. . . . It is time enough for the party to bring the purchase money into court when he is called upon to do so." *Lord Chancellor Hardwick* said in *Vernon v. Stephens,* 2 P. Wms., 66: "If the defendant has his money and interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff to lose all the money he has paid. Lapse of time in payment may be recompensed with interest and costs. And as to these agreements, they were all intended only as a security for payment of the money, which end is answered by the payment of principal, interest, and costs."

The weight of authority is that it is unnecessary for the purchaser to pay the money into court at the time he commences his suit. It is sufficient for him to plead a tender of the purchase money and to offer by his bill to bring in his money whenever the same is liquidated and he has a decree for performance. *Johnson v. Sukeley,* 2 McLean (U. S.), 562; *Mason v. Atkins,* 73 Ark., 491; *Kerr v. Hammond,* 97 Ga., 567; *Webster v. French,* 11 Ill., 254; *Hunter v. Bales,* 24 Ind., 576. See, also, *Lamprey v. St. Paul, etc., R. Co.,* 86 Minn., 509; *Birdsall v. Waldron,* 2 Edw. (N. Y.), 315.

The purchaser, if he offers in his bill to perform, may maintain a suit for specific performance, though he made no tender of the purchase money before the suit, where he shows that the vendor would have refused the tender if it had been made. *Stewart v. Cross,* 66 Ala., 22; *Jenkins v. Harrison,* 66 Ala., 345; *Root v. Johnson,* 99 Ala., 90; *Dargin v. Cranson,* 12 Colo. App., 368; *Ebert v. Arends,* 190 Ill., 221; *Tyler v. Onzts,* 93 Ky., 331; *Deichmann v. Deichmann,* 49 Mo., 107; *Christian-*

burg v. Aldrich, 30 Mont., 446; *Connely v. Haggerty,* 65 N. J. Eq., 596; *Selleck v. Tallman,* 87 N. Y., 106. In *Cheney v. Libby,* 134 U. S., 68, it was held that the discretion which the court has to decree specific performance may be controlled by the conduct of the party who refuses to perform the contract because of the failure of the other party to strictly comply with its conditions. If the vendor notifies the purchaser that he regards the contract as forfeited, and that he will not receive any money from him, the latter is not required, as a condition of his right to specific performance, to make tender of the purchase price. It is sufficient if he offer in his bill to bring the money into court. In a case involving the question of tender of performance by the party seeking relief in equity, and analogous to this, the Court said: "This being a proceeding in equity, will be governed by rules and principles prevalent in those courts where relief of that character is prayed. Among those rules, having application here, is one to be presently mentioned. The true meaning of the rule whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity must do equity,' is simply this: that where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. These terms will be imposed 'as the price of the decree it gives him.' The rule 'decides nothing in itself,' for you must first inquire what are the equities which the plaintiff must do in order ta entitle him to the relief he seeks. . . . The above are only a few out of a large number of examples which might be cited in illustration of the rule referred to, which finds its application, not in questions of pleading, nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory and final, whereby equitable terms are imposed as a condition precedent to equitable relief granted." *Whelan v. Reilly,* 61 Mo., 565. See, also, *Campbell v. Lombardo,* 153 Ala., 489.

The general and clear result of the best considered authorities is that the vendor, especially when he has been and is in default himself, or when he has denied or repudiated the contract, cannot insist upon the failure to tender the money or to bring it into court for the purpose of performance, but will be left to such protection as the court can afford in the decree, which will be shaped so as to carry out the purposes of the contract fairly and equitably, without any great regard for technicalities, the object being to do justice to both parties without unnecessarily sacrificing the rights of either. This is the wisest and safest doctrine.

In this case, the defendant will be fully protected in the enjoyment of every right he should have by requiring the payment of the money into court for his benefit, before he is called upon to part with his deed. This is all he has a right to expect under the circumstances. The decree in this case conforms to established precedents, except, perhaps, in one respect, and that objection to it can be cured by amendment. It should have set a time, say sixty days after the adjournment of the court, for the payment of the money into court by the plaintiff, and then directed, if it was not paid by the expiration of that time, the suit should be dismissed with costs, which, of course, would deny to the plaintiff any right to an enforcement of the contract, by reason of his own default after notice and reasonable time to pay or perform his part of the agreement. The plaintiff must not have any order for the sale of the land, but in such a case as this should be made to perform strictly according to the terms of the contract. If he asks equity, he must do equity. The Court, in *Webster v. French, supra,* referring to this matter, said: "In *Burke v. Boquet,* 1 Dessaus, 142, which was a bill for a specific performance, it does not appear that either a tender or a deposit in court of the purchase money was made, and yet it was decreed that it be referred to the master to state and report what is the balance due on the contract in the bill mentioned, and that on the payment thereof, with interest, and of the costs of the suit, within one month from this day, the defendant execute title to the complainant in the bill. From the brevity with which this case is reported, we cannot learn its particular circumstances, but the decision itself shows that the suit might be maintained without a deposit of the purchase money. The suit of *Louthler v. Anderson,* 1 Bro. Ch. R., 347, was of the same character, and upon a rehearing before the chancellor, 'his lordship varied the decree, in the manner prayed, by ordering it to be referred to the master to appoint a short day for the payment of the money, and to compute subsequent interest till that time, and if, upon a tender of a sufficient conveyance, the principal money and interest should not then be paid, the plaintiff's bill to be dismissed (as against defendant), with costs.' Here is the same case, of time given to the complainant, even beyond the hearing, for the payment of the purchase money." And in *Whelan v. Reilly, supra,* the Court thus refers to the subject: "The objection was made, in *Quin v. Brittain* (1 Hoff. Ch., 353), that in the bill (which was substantially a bill to redeem) there was no offer to pay the amount due. But it was held that this was not essential, and the reasons given were, that on such a bill no decree would go for the payment of the amount personally; that if the amount found due were not paid, there would be a decree for dismission of the bill, which would operate as a foreclosure. (*Bishop of Winchester v. Paine,* 11 Vesey, 194.)"

The other exceptions of the defendant have received our careful scrutiny and found to be without merit, in view of our decision upon the principal matters. We must not be construed as implying that there was error in any of the rulings to which exceptions were taken; but if there was, it does not call for a reversal of the judgment.

The court below will modify its decree substantially as follows: Require the plaintiff to pay the money due into court and otherwise to comply with his part of the contract, within a reasonable time, to be fixed by the court, and, upon his failure to do so, his right to specific performance to be denied and the action dismissed; but if he does perform, on or before the last day named, that the defendant execute a good and sufficient deed for the premises, properly acknowledged or proven, and deposit it with the clerk of the court, at a time to be named, to be delivered to the plaintiff, and when this is done, the money so deposited in court shall be paid to the defendant. As the defendant is in default, the court properly taxed him with the costs.

No error.

GARDNER & CLARK ET AL. V. B. L. MCCONNAUGHEY.

(Filed 20 December, 1911.)

1. **Exemptions — Personalty — Report of Appraisers — Specific Articles.**

When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. Revisal, sec. 695.

2. **Same—Property Exempt—Levy—Time of Sale.**

The judgment debtor is entitled to have his exemption in personal property ascertained up to and just before the process of execution under the judgment is executed by a sale, and to select the articles as provided by statute; and, therefore, when a report of the jury of assessors has been declared void and another allotment is ordered to be made, it is error to include in the reallotment articles of personalty which the judgment debtor may have consumed since the allotment under the void report. The distinction pointed out when a homestead is allotted under Revisal, secs. 687 and 692, by CLARK, C. J.

APPEAL by defendant from *Lane, J.,* at June Term, 1911, of BURKE.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

J. T. Perkins and S. J. Ervin for plaintiffs.
Spainhour & Mull for defendant.

CLARK, C. J. Execution having been issued upon a judgment taken before a justice of the peace, the sheriff, without levying upon the personal property of the defendant, summoned a jury of appraisers, who filed an itemized valuation of such property amounting to $740.62, and reported that, after deducting the $500 personal property exemption, the defendant possessed $240.62 of property which was subject to sale of execution, but without specifying and setting apart the articles which should be exempt from sale under the execution, as required by Revisal,

697. The defendant filed exceptions to the report of the appraisers as provided by Revisal, 699. At the term of the Superior Court next ensuing, the defendant moved to set aside the report of the appraisers as void, because it did not appear from the face thereof that there was any allotment of the articles set apart to the defendant as required by Revisal, 697.

The court refused to set aside the report and directed the matter to be rereferred to the appraisers to specify the articles to be allotted to the defendant, and refused to direct that the allotment should be made out of articles possessed by the defendant at the time of said allotment. The ruling of the judge was in effect that the defendant should take as a part of the allotment the articles of personal property which should have been consumed since the first assessment.

The report was void, because there were no articles specifically allotted to the defendant as his exemption, as required by Revisal, 695. The judge further erred in directing that the defendant should be charged with the articles which had been consumed or otherwise disposed of since the assessment, and also ignored the fact that other articles may have increased or depreciated in value since that date.

In *Pate v. Harper,* 94 N. C., 23, it was said: "We think the debtor is entitled to have his exemption ascertained up to and just before the process is executed by a sale. While the process is in the officer's hands in full activity the preliminary action of the appraisers is not conclusive, but remains *in fieri,* capable, at their instance, under the call of the officer, at least of correction and amendment. If property has been omitted which ought to have been put on the list, but was not known at the time to belong to the debtor, this could be done. The appraisers ought also to have the power, and we think do have it, to enlarge the exemption, so that none which should be exempt shall be sold from him. The mandate of the statute is that the officer shall make his levy upon the entire personal estate subject to seizure under execution, but, *before he sells,* to have so much of it set apart for the debtor, within the limit of value, as he may select, and when insufficient, all being below the value, such selection is unnecessary."

In *Jones v. Alsbrook,* 115 N. C., 46, the Court quotes the above, and adds that the judgment debtor is entitled up to the last moment to have his exemption set apart before the sale, and that the same right belongs to the judgment creditor.

There having been no levy, and the allotment not having been made at all, and it not appearing that the defendant was given the opportunity to select the articles, the report was fatally defective and should have been set aside.

It should be noted that there is a material difference between the allotment of the homestead under Revisal, 687, which must be done "before levying upon the real estate," and as to which the levy must be only upon the excess (Revisal, 692), and the allotment of the personal property exemption, for the personal property must be levied upon, that is, taken in possession by the officer, and the personal property exemption is then allotted in the manner provided by Revisal, 695.

The homestead exemption is permanent unless there is a reallotment by reason of an increase in value in the manner provided by Revisal, 691. But the personal property exemption is to be reassigned, whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity, between the levy of executions, especially so as to articles of food which are usually included in such exemptions.

The report of the appraisers should have been set aside and the sheriff should proceed to levy his execution, and the personal property exemption must be allotted out of the personal property in the hands of the defendant at the time of such allotment, the articles being selected by the defendant as provided by The Code. In *Campbell v. White,* 95 N. C., 344, it was held: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit," *Smith, C. J.,* saying that the Constitution, Art. X, sec. 1, is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss, or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale."

Reversed.

A. C. ROGERS v. WHITING MANUFACTURING COMPANY.

(Filed 20 December, 1911.)

1. **Master and Servant—Dangerous Machinery—Safe Place to Work—Appliances—Negligence.**

   It is actionable negligence for the master to fail to provide for his servant employed to work in a plant where the machinery is more or less complicated and driven by mechanical power, a reasonably safe place to work, and implements and appliances reasonably safe and suitable for the work in which he is engaged, such as are approved and in general use in plants of like character.

2. **Same—Evidence.**

   The servant was injured while at work in a woodworking plant of the master, at a lathe machine, and introduced evidence tending to show that the cause of the injury was the failure of the defendant to furnish a guard or shield to go over the machine to prevent its throwing splinters and pieces of wood back, and that the guards or shields were approved and in general use in plants of like character: *Held*, sufficient to go to the jury upon the question of defendant's negligence.

3. **Same—Approved and in General Use.**

   In an action by the servant for damages alleged to have been caused him by the failure of the master to furnish a shield or guard for his protection from flying splinters and wood from a lathe, at which he was at work, there was evidence tending to show that such shields and guards were in use in nine different plants of like character as the one at which the plaintiff was at work, and testified to by witnesses of experience to be approved and in general use: *Held*, not error for the trial judge to refuse to instruct the jury that if they find from the evidence that these shields and guards were in use in four places particularized from the evidence, it was not sufficient to show a general custom.

4. **Same—Proximate Cause.**
The master failed to provide the servant with an appliance for his protection while working at a machine driven by mechanical power. There was evidence tending to show that the injury complained of would not otherwise have been caused: *Held*, the question of proximate cause does not solely depend upon whether the appliance was known and in general use; for the master would be liable if the injury was caused by the absence of the appliance, if the failure of the master to supply it was a want of reasonable care on his part.

5. **Appeal and Error—Brief—Exceptions Deemed Abandoned.**
Assignments of error in the record excluded from the brief are regarded as abandoned in the Supreme Court on appeal.

APPEAL by defendant from *Cline, J.*, at March Term, 1911, of GRAHAM.

Morphew & Phillips for plaintiff.
Davis & Davis for defendant.

CLARK, C. J. This is an action for damages for an injury sustained while operating a lathe machine for the defendant. The plaintiff contended that the proximate cause of his injury was the failure of the defendant to furnish a guard or shield to go over the saws to prevent their throwing splinters and pieces of wood back, by reason of which defect the plaintiff was injured.

It is settled law in this State, "That an employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially where driven by mechanical power, is required to provide for the employees in the exercise of proper care a reasonably safe place to work, and supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged and such as are approved and in general use in plants and places of like kind and character." *Hicks v. Manufacutring Co.*, 138 N. C., 325, citing *Witsell v. R. R.*, 120 N. C., 557, and *Marks v. Cotton Mills,* 135 N. C., 287, and which is itself cited and approved in *Helms v. Waste Co.,* 151 N. C., 372.

The first nine of the defendant's exceptions are to the introduction of evidence tending to show that guards or shields were in general use in machines of like character or kinds. But such evidence is competent, and in this case it was shown that the witnesses had seen nine different mills in which such guards were in use. This was sufficient to justify the court in leaving it to the jury to find whether the defendant had been guilty of negligence in not having a protection of this kind, and it was not error to refuse a prayer, "Even if the jury shall find a mill in Georgia, one in Tennessee, one in Andrews, and one in Swain County has machines upon which were shields or hoods, this is not sufficient to show a general custom." The prayer was properly refused, for the evidence was there were at least nine mills as to which the evidence showed use of these shields over saws, though it is true that as to some of them the lathe machines were not in use in a sawmill, as was the case here, but that was immaterial.

Nor was it error to refuse the defendant's prayer to charge that "Unless the plaintiff has shown by the greater weight of evidence that these hoods or shields were in general use, the jury could not consider as proximate cause any injury caused by a chip flying out and striking the plaintiff." If the flying out of the chip was caused by the absence of the shield or hood, and the jury should further find that this would have been prevented by the use of the shield or hood, and the failure to provide such was want of reasonable care on the part of the defendant, it would be liable. *Mason v. R. R.,* 111 N. C., 482.

The plaintiff in his brief restricts himself to the first ten assignments of error, thus under the rule abandoning the others, which hence need not be discussed. This case, in its general features, resembles *Sims v. Lindsay,* 122 N. C., 678, which has been often cited, see notes in Anno. Ed.

No error.

MARION EPPLEY v. BRYSON CITY.

(Filed 20 December, 1911.)

Cities and Towns—Condemnation—Special Acts—Requisites—General Laws—Interpretation of Statutes.

An incorporated town was authorized to erect, own, and operate an electric plant under chapter 217, Private Laws of 1911, conferring the power of condemnation "in the same manner as is now provided by law for the condemnation of lands for streets." The charter of the town contains no method of procedure for condemning lands for streets: *Held,* that to lawfully authorize a municipal corporation to exercise the right of eminent domain the power must be expressly conferred or arise by necessary implication and the procedure necessary to give it effect must be provided; but a valid exercise of this power may be done by the municipality under the general law, ch. 86, sec. 1, Public Laws of 1911, where all requisite powers are conferred.

APPEAL from order of *Webb, J.,* refusing to grant an injunction, heard at chambers, 27 November, 1911. From SWAIN.

Civil action pending in the Superior Court of Swain County instituted for the purpose of obtaining a perpetual injunction forbidding the maintaining of a dam on Deep Creek or river and asking its abatement as a nuisance.

His Honor denied the motion, and plaintiff appealed.

F. C. Fisher for plaintiff.
Bryson & Black for defendant.

BROWN, J. The defendant, a municipal corporation, is duly authorized by law to erect, own, and operate an electric light plant. Chapter 217, Private Laws 1911. An election was held and the voters approved the scheme. The bonds were issued and the work commenced and several thousand dollars expended, and especially in the purchase of land and a water-power on Deep River. The dam has been erected, and it turns out now that after a survey of the property adjacent to the site of the defendant's dam, about one and three-tenths acres of plaintiff's rocky hillside mountain land is flooded. The dam has been finished and the electric light plant well advanced towards completion.

It appears from the affidavits in the record that the only controversy between plaintiff and defendant is the value of the one and three-tenths of an acre of overflowed land. The plaintiff demands $400 damages, which sum defendant avers is extortionate and defendant offers to submit the question to arbitration.

It is contended by plaintiff that the defendant has no power of eminent domain and no right to condemn his land for municipal purposes.

Chapter 217, Private Laws of 1911, sec. 1, reads as follows: "That the board of commissioners of the town of Bryson City shall have power to lay out, build, and construct a system of sewerage and sewerage pipes for said town; to build and construct an electric light plant and repair the streets and sidewalks in said town, and to protect the same by adequate ordinances; and if in the construction, extension, or maintenance of said sewer system, electric light plant, or repair work, it shall become necessary to acquire land, right of way or easement, both within or without the corporate limits of said town, said board shall have the power to condemn the same in the same manner as is now provided by law for the condemnation of land for streets."

It is contended that there is no method of procedure provided in the acts incorporating Bryson City for condemning land for streets, and that therefore there is no procedure provided for condemning plaintiff's land.

This seems to be true, and in order that a municipal corporation shall lawfully exercise the right of eminent domain the power must be expressly conferred or arise by necessary implication, and the procedure necessary to give it effect must be provided. 15 Cyc., 568. But the defendant is not confined to the act in question as the only source of its power to appropriate plaintiff's land and to have his damage assessed by a legal tribunal.

Conceding that chapter 217, Private Laws 1911, is of no effect, so far as conferring, either in direct terms or by necessary implication, the rights of eminent domain upon the defendant, still it is not without that right. Chapter 86, sec. 1, Public Laws of 1911, amending section 2916, Revisal, grants to all towns, cities, and municipal corporations the right to build, construct, maintain and operate a system of electric plants, etc. That act, in connection with the sections of the Revisal of 1905 which it amends, not only confers in express terms the right to condemn property for such public purposes, but provides all necessary legal machinery for appropriating the property and assessing the owner's damage.

Unless the plaintiff and defendant can come to some agreement as to the value of his overflowed land and the damages incident thereto, if any, the defendant can proceed under that act to have them assessed.

The judgment of the Superior Court is
Affirmed.

MARION EPPLEY v. BRYSON CITY.

ACTION commenced in Superior Court of Swain County to enjoin defendant from erecting a dam for its electric light plant on Deep River.

The motion for a restraining order was heard by his Honor, *Judge Webb,* at chambers, and the motion denied. Plaintiff appealed.

F. C. Fisher for plaintiff.
Bryson & Black for defendant.

BROWN, J. This action was commenced to restrain defendant from building the dam before its erection was begun.

As the court refused to enjoin them, the authorities of defendant proceeded to build the dam, and it is now completed. The matter involved is same as in the other case between same parties at this term, and is governed by that decision.

The judgment is
Affirmed.

O. C. WORLEY v. LAUREL RIVER LOGGING COMPANY.

(Filed 20 December, 1911.)

1. **Railroads—Negligence—Derailment—Unsafe Road—Appliances—Presumptions—Verdict, Directing.**

When the evidence is not conflicting and tends to show that the plaintiff was injured while operating defendant's train, by a derailment upon an unsafe roadbed, with unusually dangerous grades and curves, and that the equipment used was defective, the trial judge may properly direct the jury to answer the issue as to negligence in the affirmative if they found the facts to be as testified.

2. **Same—Principal and Agent—Disobedience to Orders—Further Orders—Vice-principal—Evidence—Instructions.**

When in an action for damages to an engineer operating defendant's train run by steam power, there is evidence tending to show that the injury complained of was caused by a derailment upon an unsafe roadway, and that in the train was a very unsafe car which the superintendent of the defendant company told the plaintiff not to take upon his train again, with further evidence that the car was thereafter loaded with lumber and the plaintiff instructed by another vice-principal of the defendant to take it with him on the occasion of the injury: *Held*, there being no evidence on defendant's part tending to show that its employee who instructed the plaintiff to take the loaded car on the train was not a vice-principal of defendant of equal dignity of the superintendent, it could not avail itself of an instruction precluding recovery if the jury found that the injury would not have occurred had plaintiff obeyed the order of the superintendent not to take the car out again.

3. **Master and Servant—Contributory Negligence—Dangerous Conditions—Assumption of Risks.**

The doctrine of contributory negligence, in an action for damages by defendant's engineer caused from a derailment and the unsafe condition of the track and equipment, is not made to depend upon the plaintiff's realization that he is using a defective appliance under dangerous conditions, but upon whether he was negligent in doing the particular work, or that the danger was so obvious that the chances of injury were greater than those of safety.

4. **Instructions Confusing—Contributory Negligence—Technical Correctness—Explanation—Practice.**

An instruction, in this case, *Held* technically correct, but tending to confuse and mislead juries, that if the jury "find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer" affirmatively the issue as to contributory negligence; and it is the better practice for the trial judge to adhere to the practice which requires them to explain the conduct of the plaintiff which will amount to negligence, and instruct them that if there is negligence which is the real cause of the injury, he cannot recover.

5. **Pleadings—Contributory Negligence—Unsafe Conditions—Appliances—Defense—Instructions.**

The defendant being sued by its engineer for damages alleged to have been inflicted on him in a derailment upon an unsafe track and by the use of unsafe appliances, alleged only in its answer, by way of defense, that the plaintiff's injury was caused by his negligently operating or running the train: *Held*, as there was no evidence of negligence as alleged, the defendant's prayers for instruction upon contributory negligence were properly refused.

6. **Measure of Damages—Mental Power—Evidence—Instructions.**

In an action to recover damages for a personal injury, an instruction is erroneous which tells the jury they may consider under certain conditions and phases of the evidence, as an element of damages, the loss by plaintiff of his mental powers, etc., when there is no suggestion, at any time, that the plaintiff was unconscious, or that his sufferings were of that character; and in this case a new trial is ordered, confined to the issue of damages.

7. **Appeal and Error—Objections and Exceptions—Evidence—Practice.**

Exceptions to evidence objected to must be taken in order to make the matter available on appeal.

8. **Appeal and Error—Objections and Exceptions—Instructions—Practice.**

Exceptions to the charge may be taken for the first time when the case on appeal is settled, and they should point out the parts of the charge to which exceptions are taken.

9. **Appeal and Error—Assignments of Error—Case on Appeal—Exceptions Noted.**

Assignments of error is not a part of the case on appeal and has for its purpose the grouping of exceptions noted in the case on appeal, which, if not noted, cannot be availed of as an assignment of error.

10. Same—Agreement of Parties—Interpretation.

When it appears upon a case on appeal settled by the parties, over their signatures, that each assignment of error begins "the defendant (appellant) excepted for that, etc.," the Supreme Court will assume that the exceptions upon which error was assigned were duly entered.

APPEAL from *Lane, J.,* at September Term, 1911, of MADISON.

This is an action to recover damages for personal injuries.

The plaintiff, at the time of his injury, was employed as an engineer by the defendant, a corporation, engaged in the manufacture of lumber, and operating in connection therewith a logging road.

The plaintiff alleges that he was operating the train of the defendant on 14 September, 1910, and was injured by reason of a derailment; that the defendant was negligent, in that it allowed and permitted the track and roadbed of its road to be and remain in a poor and dangerous condition, without ballast on its tracks and with many heavy grades and sharp and dangerous curves, and it allowed and permitted the brakes on the cars which the plaintiff hauled over said road in the performance of his duties to become defective and out of repair to such an extent that it was impossible to control and operate a train therewith, and permitted said brakes to remain in said defective and dangerous condition, though often notified of that fact and requested to repair the same; and it failed and neglected to keep and maintain its track and roadbed in a safe condition, and carelessly and negligently failed and neglected to keep and maintain its cars and rolling stock in good repair, so that they could be operated in safety, and did carelessly and negligently fail to furnish and equip its said road with the rolling stock, tools, and appliances in ordinary use at that time.

The defendant denies negligence, and alleges that the plaintiff was guilty of contributory negligence in that he allowed the train of cars mentioned to get beyond his control by reason of careless handling of the same; or was running the same at a dangerous and reckless rate of speed down a grade, thereby causing the same to get beyond his control; or he otherwise operated said train in a negligent, careless, and reckless manner, by reason of which negligence and carelessness the plaintiff was injured, if any injury he sustained.

The plaintiff offered evidence to sustain the allegations of negligence, and there was no evidence to the contrary.

It was in evidence that on the morning of the day the plaintiff was injured, that he told Mr. Hill, a superintendent of the defendant, that the brake on the car attached to his train was defective, and that he was told by Hill to place the car on a siding, and not to take it out until it was repaired; that the plaintiff placed the car on the siding as directed, and when he returned later he found the car loaded with lumber and took it out in his train under orders from one Anderson, who was the mill foreman, and who overlooked the taking out of cars, and who told the plaintiff that Lieb, a superintendent equal in authority with Hill, said for him to do so.

This car was a part of the train when the plaintiff was injured.

The defendant requested the court to instruct the jury as follows:

1. Before the plaintiff can recover, he must satisfy the jury, by the greater weight of the testimony, not only that defendant was negligent, but that such negligence, if the jury find there was any, was the proximate cause of plaintiff's injury; and if the jury do not so find, they will answer the first issue "No."

2. Proximate cause is the real effective cause of the injury, and if from all of the testimony you find that plaintiff's conduct was the real cause of the injury, then you will answer the first issue "No."

3. If the jury find from the evidence that if plaintiff had obeyed the orders of Hill, the superintendent, he would not have been injured, they will answer the first issue "No."

4. If you believe the evidence in this case, you will answer the second issue "Yes."

5. If you find from the evidence that plaintiff knew the car and engine being run by him were defective, and was acquainted

with the grades and curves of the roadbed, as testified by him, and knew that such operation by him was dangerous, then you will answer the second issue "Yes."

6. Plaintiff having testified that he knew the dangers incident to operating the train under the circumstances, if you believe this evidence, you will answer the second issue "Yes."

7. If you find from the greater weight of the evidence that plaintiff took out the car, which was attached to his engine, contrary to the orders of Hill, the superintendent, and that the use of this car was the proximate cause of the injury, you will answer the second issue "Yes."

8. If you find from the evidence that the superintendent Hill ordered the plaintiff not to use the car which was attached to the engine at the time of the accident, and that plaintiff disobeyed such order, and such disobedience was the proximate cause of the injury, you will answer the second issue "Yes."

9. If the jury find from the evidence that Worley reported to Superintendent Hill, on the day before the accident, that the car was out of order, and that Hill directed him to set the car out on the siding for repairs, and not to use it again until it was repaired, and that the plaintiff, Worley, in disobedience of this order, took the car out for use knowing it had not been repaired, and that such use of the car was the proximate cause of the plaintiff's injury, you will answer the second issue "Yes."

10. There is no evidence that Anderson, the mill foreman, had authority to give orders to the plaintiff, and if plaintiff obeyed an order of Anderson, in taking out the car testified about, instead of obeying the orders of Hill, the superintendent, and was injured in consequence, you will answer the second issue "Yes."

11. If you find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer the second issue "Yes."

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

Verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Gudger & McElroy for plaintiff.
Martin & Wright for defendant.

ALLEN, J. We have examined the entire record, and have considered the numerous exceptions tendered by the defendant, and find nothing of which it can justly complain on the first and second issues.

The evidence does not disclose a real controversy between the plaintiff and the defendant as to negligence, and the court would have been justified in directing the jury to answer the first issue "Yes," if the evidence was believed.

In addition to the presumption of negligence arising from a derailment (*Marcom v. R. R.,* 126 N. C., 200; *Wright v. R. R.,* 127 N. C., 229; *Hemphill v. Lumber Co.,* 141 N. C., 487), there was ample evidence that the roadbed was unsafe, that the grades and curves were unusual and dangerous, and that the equipment was defective, and there was no evidence to the contrary.

Mr. Hill, superintendent of the defendant, who was introduced by the plaintiff, gives an account of the condition of the road and its equipment, which shows utter indifference on the part of the defendant to the safety of its employees. He says: "I do not know the condition of the track where the engine ran off; from the mill down there were some very bad places. The place where the wreck occurred had little to do with it; it was the place where the engine started, from where it left the mill to where it went off. The track has about a 4 per cent grade in some places and in others about 10 per cent; it would perhaps run about the length of this hall at 4 per cent, and then dip suddenly to a 10 per cent grade. There are some reverse curves and some very sharp curves. Just before you get to the point where the engine left the track, you come around a sharp curve and take a right smart dip, and it is almost straight for twenty or thirty yards, and you make a curve, a good stiff curve, and that is where the accident occurred; it was a long and very continuous curve. I know that the car was loaded with lumber when he started out. I can't say that Mr. Worley was given orders to bring the car out, but I told Worley not to bring that car out until it was fixed. The mill foreman overlooked the bringing out of cars from the mill. He was Van Anderson, and Robert Lieb was over him. I can't recall who ordered the car loaded; don't know. All that was hearsay, so far as I am concerned. The brake was not put on properly, the rod that comes over and under the brakes—the brake-rod, I suppose you call it—passed under the rocking bolster, which the plank laid on, and this rod for some reason would work back next to the king pin, that comes through the rocking bolster, that holds it, and when you went to make a curve, that bolster would shut down on it, and you could not put the brakes on, and if there were several curves you would get a pretty good start, and it would be hard to control the train. The cars had wooden brake-shoes. I don't think there was ever another car made like it, before or since. The wheels turned on the axles. They insisted on loading the cars so heavy at the mill that I gave orders not to load over 3,500 feet on this particular car, and on other cars, and they often had on 5,000 feet. It made them so heavy that a car of that size and the tonnage of the lumber would weigh twenty tons, and without proper brakes behind a ten-ton engine. When you loaded with more than 3,500 feet, with the weight of the car, the weight was more than the engine had the capacity of controlling. The wheels on the cars were not regular car wheels in common use at that time; they were old car wheels. They looked like they were twenty or thirty years old. They turned on the axle and we often had to take the axle out. Sometimes there would be an inch play, and the car wheel would wobble as it went down the track, and when loaded so heavy it sorter cut and dug into the rails and climbed off. This car had been practically in the condition I have stated ever since it was built; there was only a piece of iron that was supposed to hold the brake-rod back, and it would break and they would put another little piece of iron in there, and it would break, and the next week something would happen again. I don't know whether the brakes on that car were like those in ordinary use on railroads of that date or not. I never saw a car like it before, and the brakes were in keeping with the car."

His Honor, however, instead of directing the jury to answer the first issue "Yes," if they believed the evidence, submitted the question of negligence to them, and gave substantially the first and second prayers for instructions. He could not have given the third, because there was evidence that, after the order of Hill, an employee of the defendant, equal in authority to Hill, gave him a different order.

The principal contentions of the defendant on the issue of contributory negligence are that the plaintiff continued to operate the train with knowledge of the defects and the danger, and that he was acting contrary to the orders of his superintendent, Hill.

We do not approve the doctrine that an employee is barred of a recovery because he realizes that he is using a defective appliance, and has some appreciation of the danger of doing so, and think the better rule is that under such circumstances there is no contributory negligence unless the employee is guilty of a negligent act in doing his work, or the danger is so obvious that the chances of injury are greater than those of safety. *Thomas v. R. R.*, 129 N. C., 394; *Hicks v. Cotton Mills,* 138 N. C., 332.

The contention of the defendant, if sustained, would encourage employers to use antiquated and defective machinery, and to notify employees of the danger, as they would thereby escape liability for injury.

The prayers for instruction based on the idea that the plaintiff could not recover if he acted contrary to the orders of Hill, were properly refused, because there was evidence that the plaintiff, at the time of his injury, was acting under the orders of another superintendent who had the authority to control him.

The principle embodied in the eleventh request for instruction is supported by authority, and may be technically correct, but we think, if applied in instructing juries, it would tend to confuse and mislead, and that it is wiser to adhere to the practice which requires the judge to explain the conduct of the plaintiff which will amount to negligence, and that if there is negligence which is the real cause of the injury, he cannot recover.

If we depart from this rule and say that the slightest negligence on the part of the plaintiff contributing to his injury is fatal to his cause of action, we must apply the same standard to the conduct of the defendant when considering the first issue, and in practical operation, the search for the real efficient cause of the injury may easily be lost sight of.

Again his Honor could have denied all the prayers for instructions on the second issue, because the only conduct of the plaintiff alleged in the answer to have been negligent was in the operation of the train, and there was no evidence of negligence in this particular.

On the issue of damages his Honor told the jury that the loss of mental powers by the plaintiff might be considered as an element of damages, when upon an examination of the evidence there is no suggestion that the plaintiff was at any time unconscious or that he suffered even momentarily an impairment of mental powers. We doubt if this affected the verdict, but we cannot say it did not, and under the authorities in this State this instruction was erroneous. *Smith v. R. R.,* 126 N. C., 712; *Wilkie v. R. R.,* 128 N. C., 113; *Bryan v. R. R.,* 134 N. C., 538.

In the *Bryan case* a new trial was ordered because a charge was given that the jury might consider the loss of physical and mental powers in estimating damage, when there was no evidence of the loss of mental powers, and this case was approved in *Jones v. Insurance Co.,* 153 N. C., 391.

We must, therefore, order a new trial, but it is restricted to the issue of damages.

Partial new trial.

MOTION TO DISMISS.

ALLEN, J. This is a motion to dismiss the appeal or to affirm the judgment, upon the ground that there are no exceptions in the record upon which the assignments of error are based.

Exceptions to evidence must be entered during the progress of the trial, and it is not sufficient to object. The exception must be noted.

Exceptions to the charge may be taken for the first time when the case on appeal is settled, and should point out the parts of the charge to which exceptions are taken.

The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal, and if there is an assignment of error not supported by an exception, it will be disregarded.

Applying these principles to the record in this case, the motion of the appellee must be denied.

The case was not settled by the judge, but by agreement of counsel. The exceptions and assignments of error follow the charge, and immediately thereafter we find the signatures of counsel for plaintiff and defendant, and each assignment begins, "The defendant excepted for that," etc.

This is, in our opinion, an agreement by counsel that the exceptions set out in the assignments were duly entered.

Motion denied.

R. L. LUTHER ET AL. v. D. P. LUTHER ET AL.

(Filed 20 December, 1911.)

1. **Tenants in Common—Partition—Parties—Pleadings—Clerks of Court.**
   In proceedings for partition of lands held in common, the petitioners are not entitled as matter of right to have a part only of the lands divided; and the defendants may, by answer, have included in the proceedings for a division such other lands as are held in common between the same parties.

2. **Same—Superior Court—Amendments.**
   In proceedings for partition of lands held in common, it is proper for the petitioners to move before the clerk to strike from the defendant's answer allegations as to other lands not held in common by the same parties; but when on appeal, by order of court, the lands objected to are excluded from the proceedings, the judge can hear and determine all matters then embraced in the controversy, and proceed with the determination of the cause as amended.

3. **Tenants in Common—Parties—Husband and Wife—Survivorship.**
   In proceedings in partition of lands by tenants in common, under allegations in the petition that "D. and I, are joint ten-

ants, as between themselves, of an undivided one-half interest in the said lands," it appearing that they are husband and wife: *Held*, the allegations mean an estate held by entireties with the right of survivorship, and entitled them to only one share in the land, and thus both were parties in interest in the land to be partitioned.

APPEAL from *Lane, J.*, at September Term, 1911, of BUNCOMBE.

This is a proceeding by R. L. Luther and S. J. Luther against D. P. Luther and wife, Ida Luther, to have partition of two tracts of land, particularly described in the petition.

The petitioners allege that R. L. Luther and S. J. Luther are owners of two undivided one-sixth interest in said lands, each being entitled to one-sixth thereof, and that the defendant D. P. Luther is the owner of an undivided one-sixth interest therein, and that he and his wife, the defendant Ida Luther, are, as between themselves, joint tenants of an undivided one-half interest.

The defendants answer and, among other things, allege that the petitioners and the defendant D. P. Luther are tenants in common of two other tracts of land described in the answer, and that they and three other persons, not parties to the proceeding, are tenants in common in a third tract of land, and ask that these three tracts be embraced in the order for partition.

The petitioners moved before the clerk to strike from the answer the allegations in reference to the three tracts of land, "for that the said portion of the answer is obnoxious because it makes the above-entitled action multifarious, in that it asks for division of tracts of land separate and distinct from the tract of land for a division of which the petition asks, and which said tracts of land are not held by the same tenants in common as the tract of land the division of which is prayed for in the petition, and in that it blends in one independent cause of action to which the same persons are not proper parties. That the said portion of the answer asked to be stricken out is irrelevant to the cause of action set forth in the petition of the petitioners."

The clerk sustained the motion, and made an order appointing commissioners to divide the land described in the petition, and the defendants excepted and appealed to the judge.

At the September Term, 1911, of court the appeal came on for hearing, and the defendants, by leave of the court, struck from their answer the allegations as to the third tract of land, and his Honor then decreed that the actions above mentioned be severed and that the proceeding to partition the lands described in the petition herein constitute one proceeding, and the proceeding to partition the lands described in the answer herein constitute a separate proceeding, and that the order of the clerk directing a partition of the lands set forth in the petition be confirmed and the exceptions of the defendant be overruled.

The defendants excepted and appealed.

Locke Craig and Jones & Williams for plaintiff.
James H. Merrimon for defendant.

ALLEN, J. The authorities seem to agree that tenants in common cannot, *as a matter of right,* have partial partition of the lands owned by them, and that when only a part of the land is described in the petition the defendant may allege that there are other lands owned in common and have them included in the order of partition. 30 Cyc., 177; *Brown v. Lynch,* 21 Am. St., 473; *Bigelow v. Littlefield,* Am. Dec., 484.

In the last case cited, the Court says: "One tenant in common cannot enforce partition of part only of the common estate. Such a course would lead to fraud and oppression.

If a different rule should be adopted and three or four small tracts of land were owned in common, separate petitions could be filed for each, costs would be increased, and frequently sales for division would be necessary, when if all were included in one petition an actual partition would be practicable.

It is, however, true, as contended by the petitioner, that the defendant cannot by answer introduce into the proceeding lands in which others, who are not parties, are interested. *Simpson v. Wallace,* 83 N. C., 477; *Brooks v. Austin,* 95 N. C., 474.

Applying these principles to the facts appearing in the record, the order of his Honor was, in our opinion, erroneous.

When the proceeding was before the clerk, the objection of the petitioners was well taken, because at that time, as to one of the tracts of land described in the answer, it was alleged that three persons were interested, who were not parties; but on appeal, by leave of court, this tract was eliminated, and the proceeding being before the judge, he could hear and determine all matters in controversy. *Roseman v. Roseman,* 127 N. C., 498.

But the petitioners further say that the elimination of the third tract did not cure the evil, because it is alleged in the petition that Ida Luther has an interest in the lands described in the petition, and it does not appear that she has any interest in the lands described in the answer.

There would be much force in this contention but for the form of the allegation in the petition, which is that "the defendants D. P. Luther and Ida Luther are joint tenants, as between themselves, of an undivided one-half interest in said lands," which we understand to mean an estate by entireties, under *Bruce v. Nicholson,* 109 N. C., 205, and other cases, with the right of survivorship.

If so, no separate part of the land would be allotted to Ida Luther, but one share would be set apart to D. P. Luther and Ida Luther.

This is in accord with the policy of our law, which is to discourage multiplicity of actions, and to administer the rights of the parties in one proceeding, when possible.

Reversed.

PETER HAYNIE, ADMINISTRATOR OF WILLIAM GRAY HAYNIE, v. THE NORTH CAROLINA ELECTRIC POWER COMPANY AND C. R. WILLARD & SONS.

(Filed 20 December, 1911.)

1. **Master and Servant—Parent and Child—Employment of Child.**

A father may stipulate with the employer of his child as to the kind of work his child may be engaged in, unless forbidden by statute, and the consent of the parent that the child may be employed at one kind of labor is not consent that he be put to another and more dangerous kind of work.

2. **Same—Contributory Negligence.**

Contributory negligence on the part of a minor child, 13 years old, employed with the consent of the parent to do a certain kind of work, is no defense in an action for personal injury received by the minor while working for the master under more dangerous conditions, to which the parent has not given his consent.

3. **Master and Servant—Parent and Child—Employment of Child—Negligence—Safe Place to Work—Consent of Parent—Contract—Burden of Proof—Dangerous Surroundings.**

An actionable wrong is committed by the master in putting a minor child, 13 years old, to work under more dangerous conditions, against the consent of his father, than those under which the parent had agreed upon, and evidence of an injury inflicted upon the child while thus employed, without the knowledge or ratification of the parent, is sufficient to take the case to the jury, the burden of proof being on the plaintiff to establish the contract of employment in his action for damages for a negligent killing of the child.

4. **Same—Duty of the Master.**

The master who has employed a minor child with the consent of the parent to work as a water carrier at a certain place, was injured while at a different place on defendant's property by being thrown from a belt operating defendant's machinery, with evidence tending to show that the defendant had agreed with the parent that the child should not be permitted to go there: *Held*, the master should not be held as an insurer, should the agreement alleged be proven, but only to use the due diligence and care to keep the child away from the machinery and at the work he was hired to do, or else return him to his parent.

APPEAL from *Webb, J.*, at May Term, 1911, of MADISON.

Civil action to recover damages for the death of William Gray Haynie, plaintiff's son, killed while in the employ of the defendants, who were constructing a dam across French Broad River.

At the close of the evidence for plaintiff a motion to nonsuit was sustained, and from the judgment rendered the plaintiff appealed.

Locke Craig, Moore & Rollins, and Jones & Williams for plaintiff.

Martin & Wright for defendant.

BROWN, J. The evidence offered by plaintiff tends to prove that his son, the intestate, aged 13 years, was killed in the engine-room of defendants, situated on west side of the French Broad River, about 12 July, 1910, by falling on the belt connected with the engine. The evidence tends to prove that the boy was employed by defendants Willard & Son as a water carrier for the men engaged on the east side of the river, in building a railroad track, and that on the west side of the river were situated all the engines and machinery for blasting and moving rock, etc.

The evidence shows that the time the boy was killed the engineer in charge of the engine was Raymond Turner, aged 20. The boy was killed by falling on the belt; the belt threw him off between the belt and the wall; his skull was cracked, his leg broken, and he was mashed to pieces and died in four hours.

The boy had often been seen playing around the belt by Turner, the engineer, and Correll, the foreman, and he was notified of the danger, but kept on playing around the belt. The evidence tends to show further that C. R. Willard knew of the boy's conduct, and that the engineer and Correll had repeatedly warned the boy.

The foundation of plaintiff's action is the allegation that his son was *non sui juris*, inexperienced and incapable of appreciating great danger, and, by reason of his youth and inexperience, careless in incurring danger; that he hired his son to defendants to work upon the east side of the river as a water carrier, away from the dangerous machinery, and he should be protected from such dangers by the defendants." Plaintiff avers that this agreement was violated by defendants and his son permitted to go in the engine-house on west side of the river and to be around and about the machinery, in consequence of which he was killed.

The plaintiff does not base his claim upon any defective machinery, but upon a distinct violation by defendants of the contract of hiring. Upon the allegations of the complaint the burden rests upon plaintiff to show a breach of the contract and that it was the proximate cause of his son's death.

The plaintiff testifies that he consented to the employment of his son by defendants for the purpose of carrying water on the east side of the river, and that he forbade them to let his son go on the other side where the machinery was; that the foreman promised that his son would be kept at work on the east side, and that he would see to it.

It is well settled that the father may stipulate as to the kind of work his child may be employed in (unless forbidden by statute), and the consent of the parent that the child may be employed at one kind of labor is not consent that he be placed in another and a more dangerous kind of work. *Braswell v. Oil Co.*, 66 S. E., 539. Thus it was held that the fact that a parent hired his son as a "doffer boy" did not authorize the employer to change his work and place in more dangerous environments. *Cotton Mills v. King*, 112 S. W., 132; *Hendrickson v. R. R.*, 30 L. R. A., U. S., 311. The notes to this case are very instructive and contain many cases illustrating and supporting this view.

The sum and substance of the many cases cited in those notes are that it is a general rule that an employer putting a minor servant, against his parent's consent, to do work by which the child is injured, commits an actionable wrong for which the employer is liable, although there is no other evidence of negligence upon his part. *Union Pac. R. R. v. Fort*, 17 Wallace, 553, and cases cited in Rose's notes annotating this case. And under such circumstances it is also held that the minor servant's contributory negligence is no defense to such action. *Marbury Lumber Co. v. Westbrook,* 121 Ala., 179, and cases cited.

As illustrating this doctrine, we may refer to cases in *antebellum* days where slaves were hired out to perform certain kinds of work and within certain limits, and the owner was permitted to recover damages for a breach of the contract because of injury to the slaves. *Slocumb v. Washington,* 51 N. C., 357; *Spivy v. Farmer,* 3 N. C., 339.

In the brief of the learned counsel for the defendant it is contended:

1. That plaintiff failed to show that defendants violated any duty to plaintiff's intestate. The evidence, if believed, shows that defendants violated the contract of hiring.

2. That there is no evidence that any act or omission of defendant was the proximate cause of the boy's death. From the evidence it is a just inference which a jury may draw that if the defendants had carried out the agreement and kept the boy away from the machinery or returned him to his father, the injury would not have occurred.

3. That all the evidence shows that the boy was guilty of negligence and disobedience of orders in going into the engine-room where he was killed.

To guard against that was the very reason why the plaintiff restricted his child's employment and required the defendants to confine him to the east side of the river. Under such circumstances the defendant cannot avail themselves of such defense. *Marbury Lumber Co. v. Westbrook, supra.*

We do not mean to hold that the defendants became insurers of the intestate's life, but if the agreement be as testified to by plaintiff, it was the duty of defendants to use due diligence and care to keep him away from the machinery and at the work he was hired to perform or else to return him to his father.

It may be that the father waived the terms of the agreement and acquiesced in his son working on the west side of the river, but the burden would be on defendants to show that, unless the facts appear from the plaintiff's own evidence.

The judgment of nonsuit is set aside.

New trial.

IN RE HUGH ALDERMAN.

(Filed 20 December, 1911.)

1. **Habeas Corpus—Custody of Child—Controlling Considerations.**
Upon proceedings in *habeas corpus* by a father for the possession of his child in the custody of its mother, the mother's possession will not be disturbed if it appears that therein the physical, moral, and spiritual welfare of the child will be the better preserved.

2. **Federal Constitution—"Full Faith and Credit"—Judgments—Divorce.**
The courts of this State will give full faith and credit under the Federal Constitution to a decree of divorce rendered in another State as regards its own citizens.

3. **Parent and Child—Property—Vested Rights—Divorce—Judgment—Extraterritorial Jurisdiction.**
A child is not regarded as the property of the parent so as to give him a vested right in the child or its services under a decree of divorce, and the decree in this respect has no extraterritorial effect beyond the boundaries of the State where it was rendered.

4. **Same—Habeas Corpus—Custody of Child.**
After a decree of divorce in another State awarding the care of the child of the marriage to the mother, the mother and child became citizens and residents of North Carolina, and while so residing the father brought proceedings here in *habeas corpus* for the custody of the child, which was denied. The father then contended that according to the decree of divorcement he was entitled to visit the child, etc.: *Held*, the decree relied upon was not subject to this interpretation; but, if otherwise, it would not have extraterritorial effect, under the full faith and credit clause of the Federal Constitution, beyond the State wherein it was rendered, so as to affect the inherent power of this State in awarding the custody of the child, which had become domiciled here.

APPEAL from judgment of *Webb, J.*, rendered in *habeas corpus* proceedings 2 August, 1911, from BUNCOMBE.

This is a proceeding in *habeas corpus* instituted by the petitioner, William F. Alderman, to determine the custody of Hugh Alderman, the infant son (4 years of age) of petitioner and his former wife, the respondent, Sarah E. Alderman, who now resides with her child at Brevard, North Carolina. The cause was heard in the Superior Court of Buncombe County by his Honor, *Judge Webb,* who made findings of fact and rendered judgment as follows:

This cause coming on to be heard before the undersigned judge, *James L. Webb,* and being heard upon the affidavits filed by both plaintiff and defendant, I find the following facts:

1. I find as a fact that W. F. Alderman and Sarah E. Alderman were married in the State of Florida about 7 June, 1899, and lived together as man and wife until about the .... day of ...., 1909.

2. I find as a fact that during the years 1909 and 1910 W. F. Alderman abandoned Sarah E. Alderman, and thereupon, Sarah E. Alderman, who was then with her child, Hugh Alderman, visiting her parents in the State of North Carolina, instituted divorce proceedings in the courts of the State of Florida, alleging willful, continued, and obstinate desertion on the part of W. F. Alderman; and the said Sarah E. Alderman was on 28 February, 1911, granted a divorce from the bonds of matrimony upon the ground of willful, continued, and obstinate desertion.

3. I find as a fact that during the relationship of man and wife between the plaintiff and the defendant there was born Hugh Alderman, the child in question, who is now a little more than 4 years of age.

4. I find as a fact that in the decree that was signed in the divorce proceedings in the State of Florida, rendered 28 February, 1911, the following clause and paragraph appears: "It is further ordered, adjudged, and decreed that the complainant, Sarah E. Alderman, have and she is granted the custody of the child, Hugh Alderman, provided that the defendant, W. F. Alderman, shall be allowed to visit said child at such times as may to the said Sarah E. Alderman seem reasonable, and the child, Hugh Alderman, may visit the defendant, William F. Alderman, at such times and under such circumstances and conditions as are reasonable and expedient, and the child may at least be permitted to visit said William F. Alderman for two weeks at a time every three months if the said William F. Alderman so desires or elects."

5. I find as a fact that the child, Hugh Alderman, is a frail and delicate child, and that said child was at the time of the institution of the divorce proceedings in the State of Florida, and prior thereto, and has been at all times since, residing with its mother, Sarah E. Alderman, and grandparents, Rev. Paul F. Brown and wife, at Brevard, Transylvania County, N. C.

6. I find as a fact that the child's health is such that it would jeopardize it to carry it from the mountains of Western North Carolina to the State of Florida, especially during the warm season of the year.

7. I find as a fact that the mother of the child, Sarah E. Alderman, is an intelligent, refined, Christian woman, living with her parents, Rev. Paul F. Brown and wife, at Brevard, N. C., and that Rev. Paul F. Brown is the pastor of the Presbyterian Church in Brevard, N. C.

8. I find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, and her parents, Rev. Paul F. Brown and wife, the grandparents of Hugh Alderman, are people of sufficient means to properly care for and make comfortable and educate the child, and I further find that the moral welfare of the child, Hugh Alderman, is being well guarded.

9. I further find as a fact that prior to the institution of the divorce proceedings in the State of Florida by Sarah E. Alderman v. W. F. Alderman, and since said proceedings were instituted, and prior to and since the decree of separation and divorce was rendered therein, the said William F. Alderman had in his employ a stenographer, one Georgia V. Farmer, and that he became infatuated with said woman, conducting himself in a way not becoming a man of a family, with a living wife; that he showed the said Georgia Farmer many attentions in various ways: riding upon street cars with her, carrying her to restaurants, theaters, purchasing small articles of various kinds for her, taking trips with her on trains, visiting her boarding-house, removing the photo of Sarah E. Alderman, his wife, from the locket on his watch chain, which locket contained the miniature photo of Sarah E. Alderman and one of their children, now dead, and placing in said locket the miniature of Georgia Farmer.

I further find as a fact that William F. Alderman, prior to the date of the decree in said divorce proceedings and while the decree for alimony was being considered, had one Roena Floyd, a single woman, to deed to Georgia Farmer, his stenographer, for a nominal sum of ten dollars, a house and lot in the city of Jacksonville, Florida, and the said deed was not registered until after said decree for divorce was signed, to wit, on 23 March, 1911.

I further find that after the institution of this suit in the Superior Court of Buncombe County to obtain the child, Hugh Alderman, the said William F. Alderman attempted to kidnap or get possession of the said Hugh Alderman, by having a colored boy to secretly get him out of the possession of his mother, Sarah E. Alderman, carry him to Hendersonville, through the country, a distance of twenty miles, there to be turned over to William F. Alderman to be carried to the State of Florida.

10. I further find as a fact that William F. Alderman has no permanent place of abode, no settled home, in which to properly care for the child, Hugh Alderman, and I further find as a fact that the said William F. Alderman is not a suitable person to have the care and custody of the child, Hugh Alderman, at this time.

11. I further find as a fact that Sarah E. Alderman, the mother of Hugh Alderman, is a fit and proper person to have the care and custody of Hugh Alderman, the child in question, in looking after the health, training, and moral development of the child.

12. I further find as a fact that Sarah E. Alderman does not object to W. F. Alderman visiting and being allowed to see the child, Hugh Alderman, under proper and reasonable conditions.

The foregoing facts are found from the large number of affidavits, perhaps fifty or more, filed by both plaintiff and defendant, and from the facts appearing and found by me, I conclude as a matter of law:

1. That the court is of the opinion that this is not a proper case where the writ of *habeas corpus* will lie.

2. That if it is a case where such writ will lie, from the foregoing findings of fact, the court is of opinion that it is for the best interest of the child, Hugh Alderman, to be left in the possession of and under the care and custody of its mother, Sarah E. Alderman, and it is so ordered.

3. It is further ordered that W. F. Alderman be allowed to visit said child, Hugh Alderman, at the home of its mother at such times and under such conditions as the mother of said child may deem advisable.

4. It is further ordered that the prayer of the petitioner be and the same is hereby refused, and it is further ordered that the petitioner, W. F. Alderman, pay all the cost of this action to be taxed by the clerk of the Superior Court of Buncombe County. JAMES L. WEBB, *Judge.*

To the foregoing order and judgment the petitioner, W. F. Alderman, excepts and appeals to the Supreme Court. Notice of appeal waived, and the appeal bond fixed at $50.

All papers in the case, including all affidavits and the foregoing findings of fact and judgment, shall constitute the case for the Supreme Court.

(Judgment filed 2 August, 1911.)

JAMES L. WEBB, *Judge.*

From this judgment the petitioner, William F. Alderman, appealed.

D. L. English and Mark W. Brown for petitioner.
Welch Galloway for respondent.

BROWN, *J.* It appears from the findings of his Honor that the petitioner and respondent were divorced by the courts of the State of Florida, where they resided in 1909 and 1910, at the instance of the respondent, upon the ground of willful, continued, and obstinate desertion by petitioner of his wife and only child, and the general custody of the child was awarded to the mother, who afterwards removed with her child to Brevard, N. C., where she now resides with her father.

The custody of children in cases of the divorce and separation of their parents is a subject as delicate as any with which courts have to deal.

The good of the child should be, and always is, the chief thing to be regarded and the governing principle which guides the judge. All other considerations sink into insignificance. Many cases and text-writers can be cited where the principle is announced that the physical, moral, and spiritual welfare of the child is the only safe guide in cases of this kind; and the courts will be guided by those surroundings. *In re Lewis,* 88 N. C., 34; *Jones v. Cotton,* 108 N. C., 458; *In re Turner,* 151 N. C., 474; Hurd on Habeas Corpus, 528; Schouler on Dom. Rel., 248; 2 Bishop M. and D., sec. 529; *Umlouf's case,* 27 Ill. App., 378.

One who reads the findings and the judgment of the just and learned judge who heard this matter in the court below must conclude that no other consideration than the child's welfare influenced his decision to remand the child to the care of its best friend, the mother. The love of the mother for her child, regardless of conditions and environments, has been proven by the history of the ages, and while her devotion can be counted upon almost unfailingly, it is sad to say that sometimes the tie between father and child is a different matter and requires the strong arm of the law to regulate it with some degree of humanity and tenderness for the child's good.

But the petitioner contends that under the Florida decree he has a vested right in the partial custody of the child, which this Court is bound to respect and enforce under the full faith and credit clause of the Federal Constitution.

That part of the decree of the Florida court which petitioner invokes reads as follows: "W. F. Alderman shall be allowed to visit said child at such times as may to said Sarah E. Alderman seem reasonable, and the child, Hugh, may visit the defendant, W. F. Alderman, at such times and under such circumstances and conditions as are reasonable and expedient, and said child may at least be permitted to visit W. F. Alderman for two weeks at a time, etc., if W. F. Alderman desires." The language used would seem to indicate that the mother is expected to exercise careful supervision and control over the child, and that her consent or permission is necessary before the child can visit its father even for two weeks at a time. But, nevertheless, if the language used was compulsory in its terms, that clause of the decree is not such a judgment of another State which the courts of this State are bound to enforce.

All States and governments possess inherent power over the marriage relation, its formation and dissolution, as regards its own citizens, and as both the husband and wife were citizens of Florida and properly before its court as parties to the suit, we must give full faith and credit to the annulment of their marriage. *Atherton v. Atherton,* 181 U. S., 155; *Haddock v. Haddock,* 201 U. S., 563.

But the infant child of their union is not property, and the father can have no vested right in the child or its services under a decree divorcing the parents. Such decree, as to the child, has no extraterritorial effect beyond the boundaries of the State where it was rendered. The child is now a citizen of North Carolina and as such peculiarly under its guardianship, and the courts of this State will not remand it to the jurisdiction of another State, especially where, as in this case, it is so manifestly against the true interests of the child. "Minors are the wards of the Nation, and even the control of them by parents is subject to the unlimited supervisory control of the State." 1 Tiedeman State and Fed. Con., p. 325; *Starnes v. Manufacturing Co.,* 147 N. C., 559. In this case it is said: "The supreme right of the State to the guardianship of children controls the natural rights of the parent when the welfare of society or of the children themselves conflicts with parental rights."

Therefore it follows that when this child became a citizen and resident of this State and duly domiciled here, it is no longer under the control of the Florida courts.

In the case of *Frank Bort,* 25 Kansas, 308, the full faith and credit clause of the Federal Constitution was invoked by the petitioner in support of his supposed right under a decree in another State.

Mr. Justice Brewer (afterwards of the Supreme Court of the United States) denied the correctness of such position, saying: "This claim seems to rest on the assumption that the parents have some property rights in the possession of their children, and is very justly repudiated by the courts of Massachusetts." 2 Bishop on Mar. and Div., 5 Ed., 204.

The same question was before the Kansas Court again in 1885, and it held that the decree of the foreign court in no manner concluded other courts of the State where the child is then residing, as to the best interests of the child. *Avery v. Avery*, 5 Pac. Rep., 419, citing and approving *In re Bort*. To the same effect is the decision of the Court of Appeals of New York in *People v. Allen,* 105 N. Y., 628.

In *Wilson v. Elliott,* 96 Tex., 474, the same question was considered by the Supreme Court of Texas and it was held that the decree of the court of another State awarding the custody of a child was not binding upon the courts of Texas under the full faith and credit clause of the Federal Constitution after the child had become domiciled in Texas. The Court says: "Were the subject-matter of the decree property, or a matter in which the parents were solely concerned, the decree would, by reason of said article, be entitled to the effect which the trial court has given it. But neither of these propositions is true. The child is not in any sense property of the parents. It is also equally well established that the Government has an interest in the welfare and consequently in the question of the custody and environments of the child, and to this the rights of the parents are entirely subordinate." See, also, *Legate v. Legate*, 87 Tex., 252; *S. v. Michell,* 54 L. R. A., 927.

The judgment is
Affirmed.

COMMISSIONERS OF CUMBERLAND COUNTY v. COMMISSIONERS OF HARNETT COUNTY.

(Filed 20 December, 1911.)

1. **Counties—Agencies of Government—Legislative Discretion—Annexation of Territory.**

Counties being agencies for the State for the convenience of local government, and under almost unlimited legislative control, except where restricted by constitutional provision, it was within the power of the Legislature to enact into a valid law chapter 591, Public Laws of 1911, taking certain described territory from the limits of Cumberland County and including it within those of

Harnett County; and except as to taxes levied previously to the enforcement of the act, and criminal cases theretofore commenced, as expressly provided in the act itself, the county of Cumberland and its officers may not further exercise any direct authority in the territory excluded therefrom. *Board of Trustees v. Webb*, 155 N. C., 379, cited and applied.

2. **Same—Taxation—Original Power—Roll-call Bills—Aye and No Vote—Constitutional Law.**

The power to exercise ordinary governmental functions, collecting taxes and the like, having been conferred originally on a county, it is not required that an act which adds territory to that county by taking it from an adjoining county, by a roll-call bill passed on separate days upon an "aye" and "no" vote, in compliance with section 14, Article II of the Constitution, for the county to exercise the right of taxation over the territory annexed, for such power already existed by virtue of the prior act of its creation; and the questions of contracting debts and the levy and collection of taxes to pay them are properly referable to the statutes, general or special, controlling in such matters.

3. **Counties — Agencies of Government — Legislative Discretion — Mandatory Powers—Interpretation of Statutes.**

When a portion of the territory of one county is detached from it and added to another county, the burden of existent indebtedness and the apportionment thereof, in the absence of constitutional provision, and in so far as the inhabitants are concerned, is referred entirely to the legislative discretion; and when it appears from the act that the commissioners of each county "have full power and authority to properly adjust the share of the bonded and floating debt" outstanding of the county from which the territory is detached, "and to make an equitable levy of taxes thereon to cover the same and to provide for the collection and payment thereof," the power conferred imposes the duty for its exercise.

APPEAL from *Whedbee, J.*, at October Term, 1911, of CUMBERLAND.

Civil action, heard on case agreed. On the hearing it was properly made to appear:

1. That the General Assembly of North Carolina, at its regular session of 1911, passed and ratified an act, the same being chapter 591 of the Public Laws of 1911, which act, as well as that which it purports to amend, to wit, chapter 8 of the Public Laws of 1855, are hereby referred to and made a part of these facts agreed.

2. That the territory purporting to be added to the county of Harnett by said act is approximately 12 miles in length and 4 miles in width at its widest point, embracing about 6 square miles of territory, containing about $280,000 taxable property and 103 taxable polls and 120 voters.

3. That said act of 1911 was not read on three separate days in either branch of the General Assembly, nor was there any roll call upon the passage of the same at any reading, nor were the ayes and noes recorded on the journals of either the House or the Senate; that the bill was originally introduced in the Senate, said bill being identical with said act, except that it did not contain the latter part of section 6 of said act, beginning with the word "provided" and including the remainder of said section. This proviso in said section was incorporated as a House amendment on its third reading in the House, and the bill was sent back to the Senate, and this amendment was concurred in by the Senate on 4 March and was ratified on 6 March, neither the bill nor the amendment being passed as a roll-call bill.

4. That in the passage of the bill which forms the act establishing the county of Harnett, viz., chapter 8 of the Public Laws of 1855, said bill was not read on three separate days in either branch of the General Assembly, nor were the ayes and noes called or recorded in the journals.

That the commissioners of Cumberland had levied taxes on the detached portion of territory for general and specific purposes for the year 1911 and had placed the tax lists in the hands of the sheriff of Cumberland, who was proceeding to collect same or threatening to do so, and the Commissioners of Harnett County had done the like. "That there had been no agreement between the boards of commissioners of the respective counties, either made or attempted, looking to the assumption on the part of Harnett County, or said disputed territory, of its proportional part of the bonded or floating indebtedness of Cumberland County, as provided in section 6 of said act, such agreement having been deferred, pending a judicial determination of this controversy." . . . "That each of the respective boards of commissioners, through the officers of their respective counties, assert and are attempting to maintain general jurisdiction of the territory in question for all governmental purposes." Upon these, the controlling facts relevant to the inquiry, it was contended for the commissioners of Cumberland that the act of 1911 is invalid and unconstitutional and that the territory in question has always been and is now a part of Cumberland County. That the municipal authorities of Harnett County should be restrained and enjoined from collecting taxes or exercising any governmental authority over said territory.

Defendants contend that the act is valid, and the commissioners of Cumberland be restrained.

The court entered judgment, (1) declaring the act constitutional and valid; (2) restraining commissioners of Cumberland from collecting taxes in said territory; (3) directing commissioners of the two counties to ascertain the proportionate part of the bonded indebtedness, etc., of Cumberland County properly chargeable to Harnett, etc.

To this judgment commissioners of Cumberland excepted and appealed.

Q. K. Nimocks, Newton, Herring & Oates, and V. C. Bullock for plaintiff.

J. C. Clifford for defendant.

HOKE, J., after stating the case: Numerous and repeated decisions of the Court are in affirmance and illustration of the principle that "Counties and townships are, as a rule, simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, except when restricted by constitutional provision." *Board of Trustees v. Webb,* 155 N. C., 379; *Lutterloh v. Fayetteville,* 149 N. C., 65; *Jones v. Commissioners of Stokes,* 143 N. C., 59; *S. v. Commissioners,* 122 N. C., 812; *McCormac v. Commissioners,* 90 N. C., 441; *Mills v. Williams,* 33 N. C., 558. Speaking to this question in *Stokes' case, supra,* the *Chief Justice* said: "The defendant suggests, however, that it infringes upon the provisions of the Constitution 'establishing and requiring them to be maintained in their integrity.' But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities, and towns as governmental agencies (*White v. Commissioners,* 90 N. C., 437), but they are all legislative creations and subject to be changed (*Dare v. Currituck,* 95 N. C., 189; *Harris v. Wright,* 121 N. C., 172); abolished (*Mills v. Williams,* 33 N. C., 558), or divided (*McCormac v. Commissioners,* 90 N. C., 441), at the will of the General Assembly."

The power of the Legislature, then, being ample, it is clear from a perusal of the statute that the territory in question has been detached from Cumberland and made a part of the county of Harnett, and except as to taxes already levied and civil and criminal cases already commenced, these limitations being expressly made by the act itself, the county of Cumberland and its officers may not further exercise direct authority in said territory.

It is urged that the act in question is invalid because the same was not passed as required by Article II, sec. 14, of the Constitution, that in reference to incurring State and municipal indebtedness. Connor and Cheshire's Constitution, pp. 117 and 118. But this is not a correct apprehension of the terms and purpose of the act. The power to exercise ordinary governmental functions, collecting taxes, etc., was given to the county of Harnett in the act creating the county in 1855, and the present statute simply annexed additional territory to the county, thereby bringing the same within the power. As to contracting debts and the levy and collection of taxes to pay the same, these questions will be referred to the statutes applicable and to the revenue acts, general or special, controlling in such matters.

When, as in this case, a portion of territory is detached, etc., the burdens of existent indebtedness and the apportionment thereof, in the absence of constitutional provision and in so far as the inhabitants are concerned, are referred entirely to the legislative discretion. *Lutterloh v. Fayetteville, supra; Commissioners of Dare v. Commissioners of Currituck,* 95 N. C., 189; *Currituck v. Commissioners of Dare,* 79 N. C., 565. Under the statute we are now considering, the Legislature intends that the existent indebtedness shall be apportioned and, in the proviso to section 6, has directed that the commissioners of the two counties "shall have full power and authority to properly adjust the share of the bonded and floating debt of Cumberland County outstanding on the first day of May, 1911, which is properly chargeable to the detached portion of Cumberland County, and to make an equitable levy of taxes thereon to cover the same and to provide for the collection and payment thereof." This is a case where the conferring of power imposes the duty for its exercise. *Jones v. Commissioners of Madison,* 137 N. C., 580. And the final portion of his Honor's judgment comes well within the purview of the statute and the precedents applicable to the facts presented. *Commissioners v. Commissioners,* 107 N. C., 291. There is no error, and the judgment of the Superior Court is

Affirmed.

THOMAS M. HICKS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 23 December, 1911.)

1. **Master and Servant—Negligence—Electricity—Dangerous Instrumentalities—Presumptions.**

   A telegraph company is presumed to know of the danger to its employees in stringing its wires over and in close proximity to the live wires of other companies engaged in supplying electricity for light and power purposes, and are held to the highest degree of care in providing proper appliances for the use of its employees in doing the work that its dangerous character requires.

2. **Same — Proximity — Contact — Safe Appliances—Evidence—Res Ipsa Loquitur—Questions for Jury.**

   A telegraph company's employee was engaged, within the scope of his employment, in stringing telegraph wires above and in close proximity to the live wires of another corporation engaged in furnishing electricity for light and power purposes, and there was evidence tending to show that the work was customarily done in such instances by the use of a rope, and that the employee should have been protected by a guard wire to prevent contact between the telegraph wire and the live wires. The employee in catching hold of the telegraph wire with his bare hand, under the orders of his superior, was killed by an electrical shock caused by the telegraph wire coming in contact with the live wire; and in an action by his administrator for damages: *Held*, the fact of the injury, under the circumstances, was sufficient to carry the case to the jury.

3. **Negligence — Electricity — Dangerous Instrumentalities—Fellow-servant—Instructions—Appeal and Error.**

When there is evidence tending to show that the plantiff's intestate was killed by the negligence of the defendant in failing to furnish him a proper appliance for stretching its telegraph wires over and in close proximity to heavily charged wires of another company furnishing electricity for light and power purposes, or in providing a guard wire to prevent contact between the telegraph wire he was handling and the live wire of the other corporation, which caused the injury, a modification of a prayer for special instruction upon the application of the doctrine of the liability of the defendant for the negligence of a fellow-servant is not material, when it appears that the trial judge instructed the jury that if the injury was proximately caused by the negligent act of the fellow-servant the plaintiff could not recover.

APPEAL from *Long, J.*, at July Term, 1911, of MCDOWELL.

This action was brought to recover damages for the death of plaintiff's intestate, which is alleged to have been caused by the negligence of the defendant. The intestate was employed by the defendant telegraph company as a ground-man, or assistant lineman, and on the day he was killed was at work for the defendant in a squad of men who were engaged in stringing wires in the town of Marion, along the right of way of the Southern Railway Company, the defendant being represented there, at the time, by W. K. McClaren, its general superintendent, and R. R. Robinson, foreman of the construction gang, of which plaintiff's intestate was a member. The said railway passes under a bridge which is a part of the main street of said town. The street runs north and south and the railway east and west. The Marion Light and Power Company, which was engaged in furnishing power and light for the citizens of the town, had strung its wires on poles over the wires of the telegraph company, along the street and across the bridge and at right angles to the wires of the said company. The wires of the power company carried about 2,300 volts of electricity, and they were in plain view of everybody in the vicinity. On the day in question, McClaren and Robinson, with certain employees of the company, were engaged in stringing wires above those of the power company, Robinson being in charge of a portion of the squad. He was stationed on the bridge, where he gave directions to the men under him as to how to place the wires, which were in immediate proximity to the power company wires. McClaren was below, to the east of the bridge, under the cut, and not in sight of Robinson. McClaren had a part of the squad with him and under his direction, among whom was plaintiff's intestate. McClaren ordered the intestate to take hold of one of the wires with his naked hand, which intestate did in obedience to the order. He had hold of the wire but a very short time, when it was allowed to sag and drop upon the wires of the power company, and thereby the current in those wires was transferred to the wire held by the plaintiff's intestate and he was killed by the deadly fluid. There was no request made to the power company to cut off this current while the work of changing the wires was going on, nor any guard wires put up for the purpose of preventing an accident, or any other protection taken to prevent the wire which was being changed from falling on the heavily charged wires of the power company.

The defendant mainly relied upon the fact that the death of the plaintiff's intestate was caused by the negligent act of Asherst, who was a fellow-servant, though it was contended also that there was no evidence of negligence on the part of defendant company.

The court explained the evidence to the jury and stated the contentions of the parties, and, among others, the following instruction was given to the jury: "If you find from the evidence that the telegraph company employed the young man Hicks to work along its telegraph line under the circumstances testified to by the witnesses, it owed him the duty to exercise reasonable and ordinary care, such care as a person of prudence would ordinarily employ with regard to his own business,.to prevent any personal injury to the person transacting such work as was agreed upon between the plaintiff and defendant, and the duty devolved upon young Hicks to use ordinary prudence to avoid danger in connection with any labor which he agreed to perform."

The court then, at the request of the defendant telegraph company, gave the following instructions:

"1. The burden is upon the plaintiff to prove by a preponderance or greater weight of the evidence that the defendant, the Western Union Telegraph Company, was negligent and that such negligence was the proximate cause of the death of the plaintiff's intestate; and if the plaintiff has failed so to prove, or if upon the whole evidence the minds of the jurors are evenly balanced as to whether or not the telegraph company was negligent, or as to whether or not such negligence was the proximate cause of the death of the plaintiff's intestate, then the jury should answer the first issue 'No.'

"2. That the defendant, the Western Union Telegraph Company, would not be liable for any negligence on the part of one of its employees who was a fellow-servant of the plaintiff's intestate; and if the jury shall find from the evidence that the death of the plaintiff's intestate was caused by the negligence of his coemployee, Asherst, this would not be negligence upon the part of the Western Union Telegraph Company, and the jury should answer the first issue 'No.'

"3. If the jury shall find the facts to be as testified to by the witnesses introduced by the Western Union Telegraph Company, the telegraph company was not guilty of negligence, and the jury should answer the first issue 'No.'

"7. Upon the whole evidence, if believed, the plaintiff's intestate, Willard Y. Hicks, and the employee, Asherst, were fellow-servants; and if the jury shall find from the evidence that the plaintiff's intestate was killed by reason of Asherst's negligence in permitting the telegraph company's wire to come in contact with the wire of the Marion Light and Power Company, this would not constitute negligence upon the part of the telegraph company, and the jury should answer the first issue 'No.'

"8. If the jury shall find from the evidence that Asherst was instructed to throw the rope over the Light and Power Company's wire preparatory to stringing another wire, and in disregard or in disobedience of such instruction he attached the rope to the wire which was being taken down, and pulled the wire so that it came in contact with the wire of the Light and Power Company, and this act on the part of Asherst was the proximate cause of the death of the plaintiff's intestate, the telegraph company was not negligent, and would not be liable for the negligence of Asherst, and the jury should answer the first issue 'No.' Given with this modification: Provided you find the method he was instructed to employ by his superior was reasonably safe under the circumstances.

"9. If the jury shall find from the evidence that Hicks was told by the superintendent, McClaren, to take hold of the wire and hold it, this would not constitute negligence, unless McClaren knew or could have reasonably anticipated that the wire might come in contact with the light wire and thus produce an injury to Hicks; and if the jury should find from the evidence that after Hicks took hold of the wire, and while he was holding it, Asherst or some other fellow-servant of Hicks pulled the wire against the light wire, or carelessly permitted the wire to come in contact with the light wire, this would not constitute negligence on the part of the telegraph company, and the jury should answer the first issue 'No.'

"10. If the jury shall find from the evidence that it was safe, at the time McClaren told Hicks to take hold of the wire, for Hicks to obey this instruction, and thereafter, in the conduct of the work, some coemployee and fellow-servant of Hicks either pulled the wire against the light wire or negligently permitted it to come in contact with the light wire so that the current passed to the wire Hicks was holding, this act on the part of the coemployee or fellow-servant of Hicks would be regarded as the proximate cause of Hicks' death, and not the original instruction of McClaren to Hicks to take hold of the wire, and the jury should answer the first issue 'No.'"

Under these instructions there was a verdict for the plaintiff, upon which a judgment was entered, and the defendant appealed.

Hudgins & Watson and A. Hall Johnston for plaintiff.
George H. Fearons and A. S. Barnard for defendant.

WALKER, J., after stating the case: It seems to us that no case could have been more accurately tried, under the rules of law, than this one was by the able and learned judge who presided at the trial in the court below. The charge was full and complete in every respect, and surely there is nothing in it of which the defendant has any just or valid reason to complain. The jury have acquitted the Light and Power Company of any negligence upon evidence supporting the verdict and under instructions free from any error, and it is not necessary that we should consider that part of the case. There was evidence coming from defendant's own witnesses that the wires of that company were regarded as live and dangerous, and work in the proximity of such wires was always conducted with reference to that fact, and it was its legal duty to assume that those wires were dangerous. *Haynes v. Gas Co.,* 114 N. C., 203. There was also evidence that it was the general custom of this telegraph company and of linemen generally, while working in close proximity to the wires of other companies, which are assumed to be live and dangerous, to use a rope in stretching wires when they are likely to come in contact with the wires of other companies, and this is done to prevent the necessity of taking hold of the wires with the naked hand, which would result in injury if the two wires should come in contact with each other. No guard wires were used so as to prevent such contact, nor were any other precautions taken to make the work of the plaintiff's intestate reasonably safe. Under the evidence and the instructions of the court, the jury must necessarily have found that the death of the intestate was not due to any negligence of Asherst, who is alleged to have been a fellow-servant, and who was on the bridge manipulating one of the wires, for the court instructed the jury that, if the negligence of the fellow-servant, Asherst, caused the death of the intestate, they should answer the first issue "No"—that is, that his death was not caused by defendant's negligence, and the jury answered the issue "Yes," and that instruction was without reference to any orders from a superior officer or vice-principal, under which Asherst may have been acting at the time. If Asherst was not negligent—and the jury have so found as a fact—what difference can it make, if the judge did modify the defendant's eighth prayer for instructions, for it is predicated entirely on the negligence of Asherst, and it is, of course, immaterial whether his negligence, if in fact there was any, consisted in disobeying safe orders or in pulling or dragging the wire negligently and in disregard of them, so that the wire sagged and fell on the live wires of the company, causing a deadly current of electricity to be transmitted to the body of the plaintiff's intestate, which resulted in his death? Let us repeat, and in a more definite manner, that the court, in giving the instruction contained in the defendant's seventh prayer, told the jury that Hicks and Asherst were fellow-servants, and if they found from the evidence that intestate's death was caused by his negligence in handling the wire—that is, any kind of negligence—it could not be imputed to the telegraph company as its negligence, although he was employed by it, and they should answer the first issue "No." It follows logically from their affirmative answer to that issue that the next prayer, which was modified, was immaterial, as it would be vain and idle for the jury to consider whether the company was negligent by reason of any unsafe orders to Asherst, or otherwise, after they had found that Asherst was not negligent at all. Of course, the company could not be made answerable for a negligence that did not exist. Besides, the court expressly told the jury, as we have seen, that if it was Asherst's negligence that caused intestate's death, it would not be the negligence of the company, and they should answer the first issue "No"; so the defendant virtually got the benefit of the instruction it asked for in its eighth prayer, in the instruction given in response to its seventh prayer.

We think that, perhaps, this is a case which calls for the application of the rule laid down in *Turner v. Power Co.,* 154 N. C., 131, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such that in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. And this statement will be found to be in accord with well-considered cases in other courts, as in *Griffin v. Manice,* 166

N. Y., 188; *Hawser v. R. R.,* 80 Md., 146; *Sheridan v. Foley,* 58 N. J. L., 230; *Armour v. Golkouska,* 95 Ill. App., 492." And again: "These and numerous other authorities on the subject will disclose that it is not the injury alone that can call for the application of this doctrine or maxim, but the injury and the facts and circumstances immediately attending it and constituting together the occurrence or event which present the conditions when it may properly be allowed to prevail. Thus in Shearman and Redfield on Negligence, sec. 59, the authors say: 'In many cases the maxim *res ipsa loquitur* applies; the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer.' "

But it is not necessary that we should go so far, for his Honor put the case to the jury practically upon the "rule of the prudent man," both as to the conduct of the defendant and of Hicks, and they found that the defendant had not, under the circumstances, exercised ordinary care. Cases showing the measure of duty of those who employ this dangerous agency in their business have been decided by this Court. *Haynes v. Gas Co., supra; Horne v. Power Co.,* 144 N. C., 375; *Harrington v. Wadesboro,* 153 N. C., 437; *Turner v. Power Co., supra.* In the *Haynes case, Justice Burwell,* speaking for the Court, said: "The danger is great, and the care and watchfulness must be commensurate with it."

It appears in this case that the defendant did absolutely nothing to provide for the safety of its servant, who was killed. Our attention has not been called to any precautionary method adopted by it for that purpose. There is no doubt as to what was the duty of the defendant to its servant occupying a position of great danger in performing his work, and there is very little law in the case. It presents substantially and largely a question of fact, which, under a faultless charge, the jury have found against the defendant. We take this extract from plaintiff's brief, adding that we think it states a correct principle of law: "It may be taken as settled by the overwhelming weight of authority that a company maintaining electric wires carrying a high voltage of electricity, is fixed with the duty of using all necessary care and prudence to make the wires safe at places where others might have the right to go either for work, business, or pleasure. *Mitchell v. Electric Co.,* 129 N. C., 166." "The defendant company was engaged in the business of manufacturing, producing, leasing, and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire, it gives no warning or knowledge of its deadly presence; vision cannot detect it; it is without color, motion, or body; latently and without sound, it exists, and being odorless, the only means of its discovery lies in the senses of feeling, communicated through the touch, of a person, which, as soon as done, he becomes its victim. In behalf of human life and the safety of mankind, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." *Mitchell v. Electric Co.,* 129 N. C., 169.

We do not think there was any error in the other rulings or in the charge to which exceptions were taken.

No error.

M. C. FERRELL, ADMINISTRATOR, v. DIXIE COTTON MILLS.

(Filed 23 December, 1911.)

1. **Negligence—Dangerous Instrumentalities—Care Required.**

Persons and corporations dealing with electricity are held to the highest degree of care in the maintenance and inspection of their wires, through which deadly currents of electricity pass, and of guy or other wires which may come in contact with the live wires, to the menace of human life.

2. **Same—Children—Invitation Implied—Trespass.**

The defendant permitted a guy wire of its electric pole to become loose from its fastening in the ground and to hang down its pole at an exposed and uninclosed place within a few inches from a naked or uninsulated wire charged with a deadly or high voltage of electricity. This hanging guy wire was attractive to the boys, who would swing on it from the pole and back again, and who would congregate there for the purpose. About eight months after the guy wire became loose, the plaintiff's intestate, his 6-year-old son, while swinging, as indicated, was instantly killed by electricity passing suddenly through the guy wire from contact with a highly charged wire carrying the current: *Held*, the defendant knew or should have known of the dangerous conditions existing, and that children would be attracted to and were accustomed to play with the loose guy wire, and the technical defense that the plaintiff's intestate was a trespasser would be unavailing.

3. **Electricity—Poles—Curtilage.**

A pole used to support wires charged with electricity to supply a cotton mill plant, situated, without inclosure, where the employees of the mill resided, at or near the corner of an uninclosed garden patch, only a short distance from the home of an employee, is sufficient for an inference that it was within the curtilage of the employee.

4. **Negligence—Electricity—Children—Invitation Implied—Warning.**

Where the defendant is negligent in permitting a loose guy wire to hang from a pole whereon there were wires carrying a high or deadly voltage of electricity to its plant, left unguarded and uninclosed, and knew or should have known that the small children of the neighborhood were accustomed to swing on the wire, and had permitted this condition to exist for several months, when it could readily have been rendered harmless, the fact that the defendant's watchman had previously told the boys to stay away from the pole is no defense in an action for damages for the death of one of the boys, 6 years of age, killed by a current of electricity while swinging on the loose guy wire.

5. **Electricity—Dangerous Instrumentalities—Negligence—Location of Poles—Control—Evidence.**

The plaintiff rented from the defendant one of the tenement-houses at its mill used by its employees, and the plaintiff's intestate, his 6-year-old son, was killed while swinging on a loose guy wire from a pole carrying wires charged with a deadly current of electricity, under circumstances tending to show negligence on the defendant's part. There was no evidence tending to show that any one except defendant had charge of this pole, or had authority to remedy any defects in or about it: *Held*, the defendant's liability did not depend on the question as to whether the pole was on or off the premises which it had rented to the plaintiff.

6. **Electricity — Dangerous Instrumentalities — Children—Parents—Contributory Negligence—Questions for Jury.**

When the evidence tends to show that the plaintiff's intestate, his 6-year-old son, was killed through the negligence of the defendant by a deadly current of electricity from its wires on a pole passing into a loose guy wire whereon the intestate was swinging, as children in the neighborhood were accustomed to do, under dangerous conditions which had previously existed for several months, the pole being uninclosed and unguarded near the home of the plaintiff; that the father was away from home at the time, engaged in his business, and the mother was taking care of her household duties, having a family of several children, it will not be held as a matter of law that the alleged negligence of the parents, in permitting their child to play with the wire, barred a recovery of damages for the wrongful death of the intestate.

7. **Instructions—Evidence.**

A prayer for instruction relating to the contributory negligence of the father, unsupported by the evidence, was properly refused.

8. **Electricity — Dangerous Instrumentalities—Negligence—Rule of Prudent Man—Proximate Cause.**

The plaintiff's intestate, his 6-year-old son, was killed by receiving a shock from a loose guy wire hanging from defendant's pole situated near his dwelling, under evidence tending to show that the injury was inflicted through the defendant's negligence.

A charge held correct, that if the jury found that a reasonably prudent man ordinarily would have permitted the wire to remain in that condition at that place it would not be the negligence of the defendant, and that recovery could not be had if the conditions were not the proximate cause of the death.

APPEAL from *Lyon, J.*, at May Term, 1911, of IREDELL.

This action was brought by the plaintiff to recover damages for the death of his son, which is alleged to have been caused by the negligence of the defendant. The intestate of plaintiff, his 6-year-old son, was killed by an electric shock received from a loose guy wire, suspended from a pole on which was strung the wires supplying defendant with power to run its cotton mill. This pole was on defendant's property and belonged to it. The guy wire was attached to the top of the pole, and fastened at the other end to a piece of timber in the ground. This guy wire was for the purpose of holding the pole in place. The wires—three of them—which carried the current were naked, that is, they were uninsulated except where they were fastened to the cross-arm on the poles. This guy wire was fastened to the pole above the cross-arm and came down between two of the electric wires, passing within some 8 inches of one of them. Some six or eight months prior to the boy's death, the earth had been removed from the place where the guy wire was fastened in the ground, so that it became loose. It was permitted to hang loose against the pole for several months before the injury. The plaintiff, with his family, lived in one of the defendant's dwelling-houses. Two of his children worked in the mill. The house was only a short distance from this pole, only 50 yards or more. Plaintiff testified that the pole was just beyond the corner of his garden patch. The evidence indicates that there were some twenty or more of the mill dwellings; that there were no fences about them, and that people, children and others, were accustomed and were permitted to go about the settlement pretty much as they pleased. This pole stood some 10 feet or more from the railway track, which at that point ran through a cut. There was a path on the side of the cut and between it and the pole. Any one who desired to do so used this path. There is much evidence in the record that children had been accustomed to play about this pole, on the railway bank, and they were seen on several occasions playing about it, playing with this loose guy wire, swinging on it out from the pole and back. This fact had been reported to the agents of the defendant. It was admitted that the wires on the pole carried a current of 2,200 volts, and the evidence shows that such a current is highly dangerous and deadly.

At the close of the testimony the defendant moved to nonsuit the plaintiff. This motion was overruled, and whether it should have been granted depends upon the state of the evidence. Defendant appealed.

L. C. Caldwell, R. S. Hutchison, Burwell & Cansler, and Tillett & Guthrie for plaintiff.

H. P. Grier and Z. V. Turlington for defendant.

WALKER, J. The negligence charged against the defendant is the maintaining by it of a highly dangerous and deadly condition and instrumentality on premises which were uninclosed, and which were in an attractive place to children, and on which defendant knew, or by the exercise of reasonable care ought to have known, that small children were accustomed to play. There was ample evidence to sustain this allegation. The contention of the appellant is that the child was a trespasser, to whom it owed no duty except to refrain from willfully injuring it. If the injury had been to a person of such mature age that he could appreciate the nature of his acts, and the dangers attached to the situation, we would agree with this contention. But when, as in this case, the injury is suffered by a 6-year-old boy, under such circumstances and surrounding conditions as the evidence showed to exist, a different rule of law governs the conduct and liability of the defendant. What did this 6-year-old boy know about the dangers of electricity? What could he possibly have known about the rules of property and the laws of trespass? Technically, he may have been a trespasser on defendant's land, but all he knew about it was that it was an attractive place to play, and that it was where he and the other little children of the neighborhood were accustomed to play, and had been playing for months past. The defendants knew, or ought to have known, that this pole with the loose guy wire attached to it was an instrument of death, which might become effective to any one who came in contact with it. The defendant also knew, or ought to have known, that the children were in the habit of playing about this pole, and that they were also in the habit of swinging on the loose guy wire. Under these circumstances, the law will not permit the defendant to allege a technical trespass and thereby shield itself from the consequences of its negligence, resulting in the death of the son of the plaintiff. The doctrine of the "turntable cases" was first before this Court in the case of *Kramer v. R. R.,* 127 N. C., 328. There the 9-year-old son of plaintiff was killed by climbing upon a pile of cross-ties negligently stacked by defendant in an unused portion of one of the streets of the town of Marion. The Court held that plaintiff's son was not a trespasser; but it further says: "If he was too young to be bound by any rule as to contributory negligence and had a habit of playing, with other boys, on the cross-ties with the knowledge of defendant, and without the defendant's attempting to prevent such sport or to take precaution against injury to the children, then the defendant was negligent. In such a case the defendant's negligence would not consist in piling the cross-ties in the street, but it would consist in its failure to guard against injury to the children, after it had learned of their habit of playing on the ties, and its failing to provide against their injury."

In *Briscoe v. Power Co.,* 148 N. C., 396, plaintiff was not permitted to recover, as the evidence failed to show that the premises of defendant were especially attractive to children, or that children were accustomed to play there; and also that this rule of law had never been held applicable in the case of a boy 13 years of age. But, in the course of the opinion, *Mr. Justice Connor* states his approval of the rule of law which we think is applicable to the case in hand. On page 411 he says, quoting from 21 A. and E. Enc., 473: "A party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises and the probability of injury from contact with conditions existing thereon." Immediately following this language, the editor says: "The doctrine that the owner of premises may be liable in negligence to trespassers whose presence on the premises was either known or might reasonably have been anticipated, is well applied in the rule of numerous cases that one who maintains dangerous implements or appliances on uninclosed premises of a nature likely to attract children in play, or permits dangerous conditions to exist thereon, is liable to a child who is so injured, though a trespasser at the time when the injuries were received; and with stronger reason, when the presence of a child trespasser is actually known to a party or when such presence would have been known had reasonable care been exercised." In the case of *Harrington v. Wadesboro,* 153 N. C., 437, plaintiff was permitted to recover for the death of her son, a 17-year-old boy, who was killed by catching hold of a wire which was hanging low over a path used by people in going to a moving-picture show.

The *Harrington case, supra; Haynes v. Gas Co.,* 114 N. C., 203; *Mitchell v. Electric Co.,* 129 N. C., 166, as well as other cases in our reports, lay down the rule that persons and corporations dealing in electricity are held to the highest degree of care in maintenance and inspection, of their wires, poles, etc. This rule is well stated in *Mitchell's case, supra:* "In behalf of human life, and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature, to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition." See *Hicks v. Telegraph Co., ante,* 519.

Henderson v. Refining Co., 68 Atl., 968, presents a state of facts almost exactly similar to the facts in this case. There the 11-year-old son of plaintiff was killed by getting into a gas engine erected on a vacant uninclosed lot by defendant. The lot lay between two dwelling-houses owned by defendant, in one of which the parents of the boy had formerly lived. The lot had been used as a sort of common, and as a playground for the children. There was a path across it. The

Court says: "A fair inference is that heedlessly or without appreciating the danger, the child ventured too near and was injured. Under these circumstances he cannot be regarded as a mere trespasser. The lot was really an appurtenance to the two houses and was a part of the curtilage." As in the above case, we think that from the evidence in this case it is reasonable to infer that this pole was within the curtilage of plaintiff's dwelling. He says that it was right at, or near to, the corner of his uninclosed garden patch, only a short distance from his home. In sustaining a recovery by the plaintiff in *Mattson v. R. R.,* 111 Am. St., 483, it is said: "It (the defendant) failed to take proper care of dynamite brought into this vicinity, and left it exposed upon premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves." In *City of Pekin v. McMahon,* 45 Am. St., 114, an 8-year-old boy was drowned in a gravel pit situated on an uninclosed vacant lot belonging to defendant. The Court says: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees. 2 Shear. and Redf. Neg. (4 Ed.), sec. 705; 4 A. and E., 53, and cases in note. In such case the owner should reasonably anticipate the injury which has happened. 1 Thompson on Neg., 304." *Tacket v. Henderson,* 108 Pac., 151, cites at length the cases of *Mitchell v. Electric Co.* and *Haynes v. Gas Co., supra,* and approves the doctrine there laid down. It is there held: "A person or corporation using wires charged with electricity is bound, while the public is not, not only to know the extent of the dangers arising from them, but to use the very highest degree of care practicable to avoid injury." In *Olsen v. Gill*, 108 Pac., 140, it is said: "Here the appellants, having no apparent use for the dynamite, and knowing of the trespassing proclivities of the boys, heedlessly stored it, a most dangerous agency, where in the exercise of ordinary prudence they should have anticipated the trespassing boys would really find, be attracted by, and take it. Under such circumstances we cannot hold that the trespassing of the boys should as a matter of law excuse the appellants from liability." The boys above mentioned were 13 and 14 years of age, and the dynamite was stored in an unlocked building on a vacant, uninclosed lot. In *Branson v. Labrot,* 50 Am. Rep., 193, it is held: "Defendants piled lumber, in a large city, on an unfenced lot which the public were accustomed to cross and children to play upon, in a negligent manner, so that it fell upon and killed a young infant who was playing on the lot near it: *Held,* that a recovery was justifiable." In *Brown v. Salt Lake City,* 93 Pac., 570, an 8-year-old boy was drowned in a conduit situated near a schoolhouse. Entrance to the conduit was barred up, but one of the bars had been broken for a year or more, and children had played in and about it for several years, and its condition had been brought to the notice of the city authorities. The Court says: "We are constrained to hold, therefore, that the doctrine of the turntable cases should be applied to all things that are uncommon and are artificially produced, and which are attractive and alluring to children of immature judgment and discretion, and are inherently dangerous, and where it is practical to guard them without serious inconvenience and without great expense to the owner." In *Price v. Water Co.,* 50 Pac., 450, an 11-year-old boy was drowned in defendant's reservoir. The reservoir was fenced, but there was a kind of stile over the fence, and defendant had knowledge that boys played about the reservoir, fishing and indulging in other sports. The Court says: "To maintain upon one's property enticements to the ignorant or unwary is tantamount to an invitation to visit and to inspect and to enjoy, and in such case the obligation to endeavor to protect from the dangers of the seductive instrument or place follows just as though the invitation had been express. . . . It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with meat so that his neighbor's dog attracted by his natural instincts might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life. Such is not law." In *Decker v. Paper Co.,* 27 N. W., 183, a 5-year-old boy was killed while playing on an elevator in defendant's mill. The evidence showed that defendant permitted children and others to go about the premises, and that it had knowledge that children were accustomed to play in this room and on this elevator, and with reference to these facts the Court said: "The elevator in the condition in which defendant maintained it was extremely dangerous as a playground for young children, and the precise manner in which the accident happened is not of serious moment as respects defendant's liability, since it is clear that death resulted from playing about the elevator. . . . Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away, and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by the plaintiff upon the same subject, presented a question for the jury." In *Franks v. Cotton Oil Co.,* 12 L. R. A. (N. S.), 468, a 10-year-old boy was killed by drowning in a reservoir on defendant's premises. The reservoir was unfenced, and children were accustomed to play about it. The Court says, quoting from Thompson on Neg., sec. 1030: "Although the dangerous thing may not be what is termed an attractive nuisance, that is to say, not have especial attraction for children by reason of their childish instincts, yet where it is so left exposed that they are likely to come into contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them." Again, quoting from Thompson Neg., sec. 1026: "One doctrine under this head is that if a child (technically) trespasses on the premises of defendant, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages unless the injury was wantonly inflicted, or was due to the recklessly careless conduct of the defendant. This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child—indeed, his inability to be a trespasser, in sound legal theory—and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty toward him which they would not owe, under the same circumstances, toward an adult." See, also, *Bridger v. R. R.,* 25 S. C., 24; *R. R. v. Stout,* 38 Law Ed., 434; *Townsend v. Wathen,* 9 East., 277; Thompson Neg., secs. 1024-1030; 2 Wood Railway Law, sec. 321; Cooley on Torts, p. 634; Bishop Noncontract Law, sec. 854; 7 A. and E. Enc., 403; 1 Street's Foundation of Legal Liability, p. 160; *Pekin v. McMahon,* 45 Am. St., 114; *Biggs v. Wire Co.,* 56 Pac., 4; *Dobbins v. R. R.,* 41 S. W., 62; *Kopplekom v. Cement Co.,* 64 Pac., 1047; *Powers v. Harlow,* 19 N. W., 257.

In *Snare v. Friedman,* 169 Fed., 1, it is said: "We think in reason and in consonance with the legal principles by which the duty of individuals to protect others from dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to children of tender years who to its knowledge were accustomed to play on the public streets in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith."

Pierce v. Leyden (C. C. A.), 157 Fed., 552, holds: "Defendant maintained a shed in a railroad yard of about two acres near a schoolhouse in a city, in which he kept open barrels of oil. During the daytime the shed was left unlocked, and for several months children living in the vicinity who played in the yard had been in the habit of stealing oil from the barrels and making fires with it in the yard, which fact was known to defendant's watchman. On one such occasion, plaintiff, who was an infant, was burned and injured. Held, that defendant was chargeable with notice of such practice of the children, from its long continuance and the knowledge of its watchman, and that the question of its keeping the place in such condition in view of the danger of their injury therefrom was for the jury."

In *Akin v. Bradley,* 92 Pac., 903, defendant had thrown some dynamite caps on a vacant lot in rear of its place of business. A path ran through this vacant lot, and school children used the patch. Plaintiff was a boy of 11 years of age. The Court said: "We think that when the respondent left these dangerous explosives by the wayside, where it knew that children, naturally attracted by such things, were constantly passing and repassing and playing therewith, it must be held to have known that such children were liable to cause some of said caps to explode in a manner likely to cause them serious injury, and that the explosion of such a cap by a dry battery in the manner shown herein did not constitute an intervening cause that should relieve respondent from liability." In *Stollery v. R. R.,* 90 N. E., 709, a boy of 10 years was killed, and his body found beside a conveyor operated by defendant on a vacant lot in a city. Held: "Under the decisions of this State, unguarded premises supplied with dangerous attractions to children are regarded as holding out an implied invitation to them, which will make the owner of the premises liable for injuries to them, even though the children be technically trespassers." This case also holds: "The rule of law is, as already stated, that the proof of negligence on the part of the appellee's intestate, as well as all the other elements of the action charged in the declaration, may be established by circumstantial evidence." The principles of the law of negligence laid down in the foregoing cases, as well as in others too numerous to cite, is both just and humane, and under the authority of these cases the court committed no error in submitting the facts in the case to the jury for their decision.

Appellant's fifth exception is to the court's refusal to charge that the defendant was not guilty of negligence, in that its watchman, the witness W. D. Plyler, had told the children to stay away from this pole. Considering the well-known propensity of children of the age of plaintiff's intestate and his playmates to desire to do what they are forbidden, the watchman's warning was hardly more than an invitation. The snip of a pair of wire cutters was all that was necessary to render this death-trap perfectly harmless. The defendant having negligently failed to perform this insignificant act, and thereby caused the death of this 6-year-old boy, now asks the court to excuse its negligence by charging the jury that it is not liable, because its watchman told those boys to stay away from this pole. This, we think, is hardly short of trifling with human life. In the excerpt already quoted from *Decker v. Paper Co., supra,* the Court, in speaking to this very question, says: "Defendant offered evidence tending to show that small boys were forbidden the premises, and, when found, that they were driven away, and it is claimed that defendant performed its full duty in keeping them away. This evidence, in connection with that offered by the plaintiff upon the same subject, presented a question for the jury." We think that this disposes of appellant's fifth exception.

Appellant's sixth exception is equally without merit. The defendant's liability in this case is in no wise dependent on the question as to whether the pole was on or off of the premises which it had rented to plaintiff, father of the dead boy. In either event, the pole was not rented to the plaintiff. Nor would it make any difference if it had been, except that it may have rendered the question of the negligence of defendant more positive and clear. *Turner v. Power Co.,* 154 N. C., 131; *Haynes v. Gas. Co., supra.* There was no evidence tending to show that any one except defendant had charge of this pole, or had any authority to remedy any defects in or about it. The defendant, therefore, was responsible for its dangerous and deadly condition.

Appellant's seventh exception is to the refusal of the court to charge the jury that plaintiff's cause of action was barred by his contributory negligence. Under the facts disclosed by the evidence in this case, the plaintiff and his wife were not guilty of contributory negligence in permitting their 6-year-old boy go out into the yard to play. In *Day v. Power Co.,* 117 S. W., 81, plaintiff's 6-year-old boy was killed by contact with a live wire which was strung near the end of a roof; plaintiff lived on the third story of a building, and this roof was used as a kind of back yard. As to the mother's contributory negligence, the Court says: "There is no sufficient ground in the facts before us for declaring the mother of the child guilty in law of negligence. Under the facts disclosed, the characterization of her conduct was an issue for the jury to solve. There is no merit in the suggestion that the child, only 6 years old, was guilty of contributory negligence." In *Henderson v. Refining Co., supra* (68 Atl., 968), the Court says: "As to the suggestion that the parents were guilty of contributory negligence, they could not be so held as a matter of law, merely because they allowed a 7-year-old boy to go around by himself upon the streets in the vicinity of his home, or to visit a neighbor's house. At most, the question would be for the jury. *Enright v. R. R.,* 54 Atl., 317. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the machinery. It was not so clear a duty that the court could declare it as a matter of law." *Enright v. R. R.,* 54 Atl., 317, holding a father not guilty of contributory negligence in permitting an 11-year-old son to stroll along railway tracks one and one-half blocks away from home, the Court says: "The doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil." In *Colorado Springs Electric Co. v. Soper,* 88 Pac., 161, twins 5 years of age were permitted to play in the grounds of a nearby public institution for deaf and dumb; a passing teamster allowed them to ride with him some two blocks away. One of the children, after being put down, took hold of a piece of barb wire lying in the grass, the other end of which was attached to an electric light pole and in contact with electric wires; the child was injured. In speaking to the question of the contributory negligence on the part of the child's parents, the Court says: "They were away from the traveled portion of the street, safe and secure from all dangerous things rightfully on the street. The barbed wire charged with electricity had no right to be there. If parents are negligent in permitting children to play out of doors, on public grounds in the daytime, unattended by the parents themselves or others, then, in the majority of cases, it will be necessary to go out of the business of raising or attempting to raise children, because parents cannot be with children at all hours of the day; neither is it practical to employ others to be with them to guard them against unseen dangers." In *Compty v. Starke,* 109 N. W., 650, the Court says: "Upon the issue of contributory negligence of plaintiff's mother, the evidence tends to show that she lives in a house something more than a block and a half from the place of injury, and around two street corners; that she is a woman who earns her own living as a nurse, and had the care of the housekeeping for her family, consisting of her mother, an adult brother, herself, and three children; that she had never known the plaintiff to go where the pile driver was at work; that on the day in question her brother was sick in bed, and she was engaged in her Saturday house-cleaning; that she gave plaintiff his lunch in the kitchen, which had a door leading into the back yard which was not locked; that after giving him his lunch, she turned to her work in another room and was out of sight only ten or fifteen minutes when she learned of his injury. . . . We think that the ordinary mother of a family, under these circumstances, would be very much surprised to hear that she had been guilty of negligence in the care of an approximately 3-year-old child. Certainly the fact of such negligence is not clear enough to be declared so as a matter of law." In *Tecker v. R. R.,* 111 Pac., 791, a boy 6½ years of age went to the postoffice with his 10-year-old sister; she went in and got the mail, and when she came out the boy had gone into the street, and had been run over and killed by one of defendant's cars. The Court says: "Nor can it be said as matter of law that the parents of a child are negligent in permitting him to go upon the streets in the care of another child of sufficient age to appreciate and avoid danger, or other competent custodian. In such cases the question of negligence should be submitted to the jury. 29 Cyc., 558. The parent is only required to exercise ordinary care in watching and controlling the child. 29 Cyc., 556; *Cameron v. Duluth Co.,* 102 N. W., 208." In *Sexton v. R. R.,* 60 Atl., 1022, a boy 6½ years of age was injured. The Court says: "The father of the boy was not precluded from recovering because he permitted his son to go upon the streets in a business part of the city unattended." It appeared in *Gunn v. R. R.,* 36 L. R. A., 575, that two boys, 5 and 6 years of age, were run over and killed by a train of defendant. They lived 300 to 400 yards from the railroad. In speaking to the question of the contributory negligence of the mother, the Court says: "The mother sent them that morning to turn the cows up the road, and come back by the corn lot and garden—a different direction from the trestle, I understand. They could not pen or imprison their children from light and air and exercise and play. They could not always keep unfailing watch upon them." The evidence in this case shows that the father was away from home from early in the morning until late at night, earning a living for himself and family; that the mother was at home taking care of her household duties, which the presence of several children must have rendered both numerous and exacting. Under such circumstances, surely it cannot be held as matter of law that these parents were negligent in permitting their 6-year-old boy to go out in the yard to play, without constantly watching him. If such a rule should be adopted, a large majority of the mothers would be forced to keep their little children in the house, or else be responsible for any injury suffered by them at the hands of others.

As to the eighth exception, upon the question of contributory negligence, there is no evidence that the plaintiff knew of the condition of the pole and loose guy wire till August. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the wire. It was not so clear a duty that the court could declare it as a matter of law.

The ninth exception is to the court's definition of negligence. This exception is without merit, particularly as the court charged the jury as follows: "But if you find a reasonably prudent man ordinarily would have permitted that wire to remain as it was in the place as it was, detached from the ground, then it would not be negligent in the company in having it in that condition; or if you should find that it was not the proximate cause of the plaintiff's intestate's death, why you should answer the first issue No." *Hicks v. Telegraph Co., ante,* 519.

What has been said in regard to the preceding assignments of error, together with the authorities set out, and the principles stated, dispose of the other exceptions. Those facts of this case which are uncontested present a clear case of negligence, the jury having found against the defendant's contention, under the charge of the court, which gave to it the benefit of every principle of law to which it was fairly entitled. At very small expense, the defendant, with notice of the dangerous situation, could by the exercise of the slightest care have prevented this accident, and the wonder is that it did not at once take steps to do so. It may be that the courts, in view of so many injuries from this deadly agency, which without proper care is a constant menace to the public, will have to suggest that companies who make use of it in their business must either convey it by wires laid underground or so safeguard their wires as to remove this ever-increasing danger to those who, in their ordinary avocations, must come in close proximity to this subtle, dangerous, and oftentimes fatal current. It is no injustice or hardship to the defendant that we hold it liable under the conceded facts of this case.

No error.

L. S. OVERMAN, ADMINISTRATOR, v. MATTIE LANIER ET AL.

(Filed 23 December, 1911.)

1. **Appeal and Error—Executors and Administrators—Account and Settlement—Reference—Findings—Attorneys' Fees.**

   When fees for attorneys employed by an administrator are found as a fact by a referee to have been unnecessary, and this finding has been approved by the judge of the lower court, the ruling of that court will be approved on appeal, when there is evidence to support it.

2. **Same—Employees—Commissions.**

   Upon petition of an administrator for a final account and settlement, an answer was filed by the heirs at law and distributees, and the matter referred. The referee found that the clerk's allowance to the administrator was a commission of $10,000, expenditures for clerks' and attorneys' fees $8,000, or over 16 per cent of the total receipts: *Held*, (1) five per cent is the limit allowed by law, within which the compensation should be proportioned according to the services rendered and in consideration of all the facts and circumstances; (2) the *ex parte* allowance by the clerk is not conclusive; (3) in this case an allowance to the administrator of 4 per cent upon the receipts and 2½ per cent upon the disbursements, approved by the judge, will not be disturbed on appeal.

3. **Executors and Administrators—Final Account and Settlement—Personal Liability—Wagering Contracts—Burden of Proof—Interpretation of Statutes.**

   A petition by an administrator for a final account and settlement was resisted by the heirs at law and distributees, and the matter referred. In their answer, the defendants alleged that certain notes, valid on their face, were given for a gambling contract in cotton futures, and should not have been paid: *Held*, the provisions of Revisal, sec. 1691, do not apply so as to place the burden of proof on the administrator to show that the notes were given for a valid contract requiring the actual delivery of the cotton; and an exception by the defendant to the report of the referee in holding the payment of the notes a valid disbursement will not be sustained in the absence of any findings as to the nature of the contract for which they were given.

4. **Executors and Administrators—Insurance Policy as Collateral—Payment of Premiums—Loss to Estate—Personal Charge—Rule of Prudent Man.**

   A finding by a referee, confirmed by the judge, that an administrator paid, in good faith, under the rule of the prudent man, premiums on a life insurance policy held as collateral to a note given the deceased, and which ultimately resulted in loss to the estate, will, upon supporting evidence, be upheld on appeal, and the administrator allowed credits for the amounts he has thus paid out.

5. **Executors and Administrators—Management of Estate—Personal Liability—Appeal and Error.**

Upon the findings of fact by the referee, confirmed by the judge, in this case, as to the administrator's management and sale of a distillery interest and liquor belonging to the estate, the defendant's exceptions of law cannot be sustained.

6. **Executors and Administrators—Clerk Hire—Commissions.**

Ordinarily administrators should not be allowed for the expenses of a clerk and bookkeeper, so as to increase the amount of the commissions beyond that allowed by the statute.

7. **Executors and Administrators—Commissions—Counsel's Fees.**

While allowances to administrators for counsel fees should be carefully scrutinized by the court, the report of the referee, confirmed by the court, in this case, allowing fees of $1,000 as not being excessive under the conditions disclosed, is sustained.

8. **Executors and Administrators—Final Account—Personal Liability—Answer—Nature of Action.**

When in answer to a petition by an administrator for an account and settlement, the heirs and distributees seek to charge the administrator personally with debts he has charged against the estate, the action becomes one personally against the administrator, and as to such things he is not entitled to an attorney's fee for professional legal services rendered therein.

9. **Same — Partial Recovery — Costs—Statement—Reformation—Interest.**

In this action, in the nature of one to personally charge the administrator with certain debts of the estate, there was final recovery of about $6,000 in excess of the sum the administrator admitted to be due; and all costs should be taxed against him but for the fact that the heirs and distributees unsuccessfully sought to recover further and larger sums; it is adjudged that the cost of the litigation be divided between the parties and that the account of the administrator be reformed, and that interest be charged on the correct amount due by him from the date of his filing his report.

10. Appeal and Error—Unnecessary Matter—Stenographer's Notes —Cost.

Upon objection duly entered to the sending up on appeal of the stenographer's notes with questions and answers, instead of in a narrative form, the unnecessary additional pages thus made will be taxed against the party at whose instance it is done.

APPEAL by both parties from *Lyon, J.*, at May Term, 1911, of ROWAN.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

T. F. Kluttz, E. C. Gregory, T. J. Jerome, E. J. Justice, and L. H. Clement and C. W. Tillett for plaintiff.

Walser & Walser, G. W. Garland, Burwell & Cansler, and Manly, Hendren & Womble for defendants.

CLARK, C. J. J. B. Lanier of Salisbury died intestate in 1894 and the plaintiff was appointed administrator. In September, 1904, the plaintiff filed his petition for a final account and settlement, and the heirs at law and distributees filed an answer to the petition. The matter was referred to a referee, to whose report both parties filed exceptions. The judge overruled all exceptions, to which action both sides filed exceptions and appealed.

PLAINTIFF'S APPEAL.

The plaintiff abandons all exceptions in his appeal except:

1. The disallowance of $250 attorney's fees to Watson & Buxton. The referee found as a matter of fact that it was unnecessary for the plaintiff to consult them in behalf of the estate, and this finding of fact has been approved by the judge. The ruling of law thereon, that this fee should not be allowed to the administrator, must be approved.

2. The referee reports that the clerk's allowance of commissions to the administrator of 5 per cent amounted approximately to $10,000; that the expenditures for clerical services, attorneys' fees, and expenses amount to over $8,000, making a total of about $18,000, or over 16 per cent of the total receipts, the total collections being about $110,000; that the largest part of the estate was settled in two years, but the entire administration

lasted about nine years. The referee going over the record of the administration in full, found that 4 per cent upon the receipts and 2½ per cent upon the disbursements would be a fair compensation to the administrator for his services. Five per cent is the limit allowed by law, but within that limit the compensation should be proportioned according to the services rendered and in consideration of all the facts and circumstances. The *ex parte* allowance of commissions by the clerk is not conclusive (*Walton v. Avery,* 22 N. C., 404), and in *Green v. Barbee,* 84 N. C., 72, the Court said: "The compensation allowed the personal representative for his services within the limit of 5 per cent on both sides rests in the sound discretion of the tribunal called to pass upon the question." The judge below, in reviewing the entire dealings and acts touching the administration of the estate, concurred in the allowance made by the referee, and we see no reason to disturb it.

3. The other exception is that the referee held that the administrator should not be allowed more than $1,000 for his attorney's fees in representing him in this present matter. The defendants except to the allowance of any attorneys' fees at all to the administrator for defending himself in this action, and the whole matter will be considered on the defendant's appeal.

In the plaintiff's appeal the judgment should be

Affirmed.

DEFENDANTS' APPEAL.

Passing by the exceptions to the findings of fact, as to all which there was evidence and the rulings upon which by the judge are conclusive upon us, the first exception to be considered is to the allowance of $30,000 paid upon the Rountree notes which the defendants contended were given for losses on "futures" in the New York market and which was therefore a gambling debt and invalid under Revisal, 1691. The referee found as a fact: "The record does not disclose sufficient evidence either to show affirmatively that this was a gambling contract or that it was a legitimate debt made with the intention that the cotton should be delivered, and the referee finds that the administrator had no such knowledge of the nature of the transaction which resulted in the Rountree debts, nor could have procured the same upon reasonable inquiry, as would have enabled him successfully to resist suits brought thereon, on the ground that they were incurred under gambling contracts." We cannot agree with the defendants that because in their answer in this proceeding they alleged that these were gambling debts, this cast the burden of proof upon the plaintiff under Revisal, 1691. That provision applies where a party sues upon the contract and the debtor denies it and sets up the defense. But here the defendants are alleging that the payment by the plaintiff of his intestate's notes, valid on their face, is invalid because the contract was founded upon illegal consideration, and the burden was upon them to prove it.

The matter has been very fully and ably argued by counsel on both sides. But in view of the findings of fact by the referee, that it is not shown that this debt was for a gambling contract, and the approval of that finding by the court, we cannot sustain the exception.

Nor can we sustain the exception that the referee paid out insurance premiums to keep up a policy which was held as collateral to a note due by Payne, who was a man in advanced years and in somewhat feeble health. It is true that this turned out a loss to the estate. But it is found that the administrator acted in good faith, and it cannot be held that a reasonably prudent man would have acted differently under the circumstances. It has been forcibly said by some one that "Our hindsights are better than our foresights."

Nor do the facts in evidence justify the contention of the defendants, that the administrator should forfeit all commissions. The referee has not found evidence of negligence and unlawful mismanagement to justify it.

The findings of fact in regard to the management and sale of the distillery interest and liquor belonging to the estate preclude our sustaining the exceptions of law in regard to the administrator's action in that respect.

While, ordinarily, administrators should not be allowed for clerk hire and the expenses of a bookkeeper, this being usually a part of the ordinary services for which he receives a commission, in this case the evidence discloses that it was necessary to employ such clerical assistance, and the allowance thereof was doubtless considered by the court below in fixing the commissions below the limit allowed by law.

The defendants also except because at the time of the death of Lanier there was in the bank the sum of nearly $5,000, and the defendants insist that commissions should not be allowed on this item, or at least not as high as 4 per cent. But doubtless this item was considered with others in fixing the amount of the commissions allowed the administrator.

The administrator was allowed attorneys' fees in the course of the administration of the estate, *i. e.,* prior to the present suit, to the amount of $2,651.39, of which approximately $1,000 was paid to his resident counsel. The defendants except to this allowance, especially the latter, because the plaintiff was himself an excellent lawyer, which was doubtless one cause of his selection as administrator. While allowances for counsel fees should be carefully scrutinized, the court below and the referee have found that these amounts were not excessive and in reviewing the history of the management of this estate and the amount of litigation we cannot overrule the conclusion of the judge below.

The defendants further except because the plaintiff has been allowed $1,000 counsel fees in this litigation. His final report disclosed that after handling the estate at a cost of $18,000, out of which $10,000 went to him as commissions, $2,631 to lawyers for fees in regard to the litigation of the estate, and between $5,000 and $6,000 for clerk hire and incidental expenses, the plaintiff held in his hands for the heirs and distributees only $685.34 out of an estate whose total assets amounted to $110,000. To this report the defendants excepted, and by the judgment of the court below the balance due them has been increased to $5,346.33. This litigation has been not in the interest of the estate nor a mere formal proceeding to close it up, but in truth and in fact it has been a contest between the heirs at law on the one side and the administrator whom they sought to make individually liable on the other. The result shows that while the administrator has not been fixed with large sums which the defendants allege he should be made liable for, the contest has been to protect himself individually from such liability, and the services of the attorneys were for his personal benefit in that regard. Besides, it has been adjudged that he is indebted to the estate nearly $6,000 more than he returned in his report as due the heirs at law and the distributees. The counsel fees for opposing the recovery of such judgment should be charged against the administrator personally, as is the judgment itself.

In *Stonestreet v. Frost*, 123 N. C., 644, it is said: "We think that the administrator should not have been allowed the $100 fee which he paid the attorney out of the assets of the estate, for the reason that the service was rendered by the attorney for the attempted prevention of the recovery against the administrator by the distributees of that which belonged to them." And in *Allen v. Royster*, 107 N. C., 383, it is also said: "An administrator should not be allowed credit for fees paid counsel in defense of an action to compel him to a final account with the next of kin." The true rule, that the fiduciary "is entitled to be credited for a reasonable sum paid to an accountant or attorney for stating the account. We think, too, if there is any difficulty in doing it, he is entitled to the advice of counsel and to credit for any reasonable fee paid for that purpose. But for any payment beyond this it must be an exceptional case to entitle him to credit." *Whitford v. Foy*, 65 N. C., 276.

For the above reasons we also think that the cost of this litigation below should be divided between the parties. The final result is recovery by the defendants of about $6,000 in excess of the amount which the administrator admitted to be due them in his final account. But for the fact that they sought to charge him with further sums in which they are not successful, the entire cost of the litigation should have fallen upon the plaintiff. Notwithstanding its form, this is really an action by the defendants to charge the plaintiff individually with sums which he had received for the estate and in which action the defendants have recovered judgment against him. The account should also be reformed to charge the administrator with interest, from the date of filing the report, on so much of the amount which is now adjudged to have been due by him at that date, on which interest is not calculated in the judgment below.

The defendants in the judgment below, in accordance with Rule 22 of this Court, objected at the time of making up the case to the sending up of the stenographer's notes in form of question and answer instead of in narrative form, as we have often stated should be done. *Cressler v. Asheville,* 138 N. C., 482. These notes, however, were sent up on demand of the plaintiff, together with other unnecessary parts of the record. The defendants contend that such unnecessary additions amount to 175 printed pages. Upon a careful estimate we think that at least 125 printed pages of the matter sent up over the objection of the defendants, and upon the demand of the plaintiff, were unnecessary and the cost of copying and printing the same should be taxed against the plaintiff. *Land Co. v. Jennett,* 128 N. C., 4. This is in addition to the allowance of 60 pages to be taxed in favor of the defendant under Rule 22.

In defendant's appeal there is

Error.

THERMAL BELT SANITARIUM COMPANY v. HARTFORD INSURANCE COMPANY.

(Filed 23 December, 1911.)

1. **Insurance — "Adjoining and Communicating Additions" — Property Insured—Parol Evidence—Interpretation of Policy.**

   In an action by a sanitarium company for loss under a policy of fire insurance on its "two-story frame metal-roof building, with adjoining and communicating additions, etc.," recovery was resisted on the grounds that the policy did not cover a cottage about 15 or 20 feet from the main building, as it was not an "adjoining or communicating addition": *Held,* (1) evidence was competent to fit the cottage to the description in the policy which tended to show that the cottages contained rooms for the patients of the sanitarium who were, under certain circumstances, treated in these rooms; that all were under the same management and that there were call-bells from each of these rooms which communicated with the main building, and that all had the same system of sewerage and water pipes; (2) that the cottages would come within the descriptive terms of the policy as a matter of law; (3) that testimony that the cottages were insured in separate and distinct amounts in another policy would relate to the weight of the testimony and not to its competency.

2. Insurance, Fire—Title—Evidence—Issued to "Insured"—Possession.

Evidence that the policy of insurance "was issued to the insured," and that the insured was in possession and control of it, is sufficient upon the question of the plaintiff's title, in his action to recover damages from fire to his property on his policy of insurance, and conclusive unless in some way questioned or impeached.

APPEAL from *Lane, J.*, at May Term, 1911, of POLK.

Civil action to recover on two concurrent fire insurance policies. The evidence tended to show that plaintiff corporation held two concurrent fire insurance policies, alleged to cover its main building and four cottages situate near the same, and "That on 5 May, 1909, a fire occurred which destroyed one of the cottages and also damaged the main building. Defendant resisted recovery for destruction of the cottage, claiming that same was not covered by the descriptive terms of the policy. The following is the description, which it seems was typewritten and annexed to each of the policies:

"$2,000 on the two-story frame metal-roof building, with *adjoining* and *communicating* additions, including foundations, piping and plumbing, fixed heating and lighting apparatus and all permanent fixtures as a part of said building while occupied as a sanitarium, situate detached in the town of Tryon."

And in reference thereto and over defendant's objection this, with other evidence, was admitted, being the relevant part of a conversation between the general manager of plaintiff company and the insurance agent in reference to the acceptance of the policies and at the time same were delivered.

Q. Did you have any conversation with Mr. Engle about the policies? A. Yes.

Q. What was it?

Objection by defendant. Overruled, and exception.

A. I read over the typewritten portion of the contract and said: "I don't like this adjoining and communicating. It is not right, because the buildings are not adjoining." Mr. Engle said the insurance companies considered buildings as close together as those were, adjoining and communicating, when used for the same purpose.

Defendant's objection to this answer overruled, and defendant excepts.

Q. How many buildings were there in the plant? A. Five.

Q. What did they consist of?

Defendant's objection overruled, and defendant excepts.

A. Consisted of a main building, or administration building, and four cottages. These cottages were used for the sick patients' rooms and the main building for the nurses and doctors, housekeeper, dining-room, kitchen, and office room.

Q. Were there any kitchens in the cottages?

Defendant's objection overruled. Defendant excepts.

A. No.

Q. What was in the cottages?

Defendant's objection overruled. Defendant excepts.

A. First a sun room on the outside, a hall, four bedrooms, bath-room, and trunk-room.

Q. How far were they from the main building?

Defendant's objection overruled. Defendant excepts.

A. About 15 or 20 feet.

Q. Was there any communication with the main building? A. Annunciator system running to the main building. (Defendant's objection overruled. Defendant excepts.) These were for the patients to summon the nurses from the nurses' rooms; there was a button in each room, with an electric wire communicating with the bell in the main building.

Q. Were there any laundries in the cottages? A. No.

Q. Was it possible for anybody to use the cottages independent of the main building, as a separate establishment? A. No.

To all of the foregoing evidence the defendant in apt time objected. Objection overruled, and defendant excepted.

Q. Going back to the main building, describe that. A. The main building was a two-story building, the first floor consisting of a porch running around three sides, a hall and writing-room, or office, reception-room, dining-room, pantry, and the housekeeper's room.

Q. What was the shape of this building apart from the porches? A. It was an oblong building.

Q. Were there any additions to that building? A. No, there were no additions to the main building proper; it was one building, oblong in shape.

Q. Do you recollect a fire occurring in your property there? A. Yes.

Q. About when was that fire? A. It occurred about 5 May, 1909.

Q. What was destroyed in that fire, if anything? A. One of the cottages, and the main building and another cottage were damaged.

There was other testimony more fully describing the physical placing of the cottages and their purpose and uses in relation to the plant.

On the trial a witness, E. Brownlee, having an interest in the property and its management, was allowed, over defendant's objection, to say that the property was owned by plaintiff, the Thermal Belt Sanitarium Company. In this connection, it appeared that plaintiff was in possession and control and management of the property when same was insured and at the time of trial. There was verdict for plaintiff for amount of loss.

Judgment, and defendant excepted and appealed.

Harkins & Van Winkle for plaintiff.
A. S. Barnard for defendant.

HOKE, J., after stating the case: The descriptive words of this policy and the physical placing of the cottages and their use and purpose in connection with the plant and its operation are made to appear further as follows: "The location of the buildings is on top of the hill above the town, consisting of one administration building, which is a two-story frame metal-roof building, longer than wide, with nothing in the way of a lean-to nailed to the building. The rest of the sanitarium property consisted of four cottages, one story, metal roof, consisting of four rooms, bath and trunk room, located in a semicircle; two cottages, No. 1 and No. 4, about 20 feet from each corner of the main building, the other cottages about 20 feet distant from each other, making a half circle around the front of the main building. They have an electric bell system. There was a series of wires running from each room of each cottage to the hall of the administration building, and there was also a water supply system, extending from a tank on the upper part of the grounds to the main building, and from the main building to all the cottages, one continuous system. Also a sewerage system accommodating all four cottages, one line going from the main building to a cesspool, and a line going from each of the cottages to the main line. There was a push-button in each room, so that when the patients needed assistance they could ring the bell in the main building.

Q. What were those cottages used for? A. Sleeping rooms for the patients.

Q. Used for any other purpose? A. No.

Q. Were there any kitchens, dining-rooms, or laundry in these cottages? A. No.

Q. How were they used in connection with the main building?

Defendant's objection overruled; defendant excepts.

A. Used as sleeping-rooms for patients. The patients used those for bedrooms and went to the main building for meals, if well enough. (Defendant's objection overruled; defendant excepts.) And for consultation with physicians; but if not well enough, the meals were sent out from the main building, and if in their beds, the doctor's nurses visited them in their rooms.

On this or similar facts there is authority tending to support the position that the cottages would come within the descriptive terms of the policies as a matter of law. *Massey v. Belisle,* 24 N. C., 170; *Marsh v. Insurance Co.,* 71 N. H., 252; *Mattherson v. Kimball,* 70 Ark., 451. But in any event—and this, in our opinion, is the more correct view—the words are so far ambiguous as to permit the parol testimony in aid of the description and so as to carry out the true intent and agreement of the parties. *R. R. v. R. R.,* 147 N. C., 382; *Ward v. Gay,* 137 N. C., 400; *Merriam v. U. S.,* 107 U. S., 441; *Sargent v. Adams,* 69 Mass., 72; *Robinson v. Insurance Co.,* 87 Me., 399; *Lumber Co. v. Insurance Co.,* 145 Mich., 558. *Insurance Co. v. Tye,* 1 Ga. App., 380, an authority much relied upon by defendant, could well be distinguished from the case presented here. The decision proceeds upon the supposition that under certain conditions parol evidence could be received with the view and purpose of changing the conclusion reached. When we consider the relevant facts in evidence, the position of the cottages, only 20 feet away, the physical connections between these and the main building in reference to water, light, sewerage, etc., "the inseparable identity of use" and with nothing to fill the descriptive words, "adjoining and communicating additions," except the cottages, there is assuredly no error to defendant's prejudice in referring the question to the jury as to whether the policy did and was intended to cover and protect the cottages. The position is not affected by the fact that a former policy had insured the main building and the cottages in separate and different amounts. This is an opposing fact, bearing on the weight of the testimony objected to, and did not affect its competency. It was this fact which called forth the protest of plaintiff's officials as to the insufficiency of the description, and which was quieted by the assurance of the company's agent that the description as written would include the cottages. There was no reversible error in permitting the witness to say that plaintiff was the owner of the property. This is a case where title is presumed *prima facie* from the possession and control of the property, and, further, the issuance of the "policy to the insured" was itself *prima facie* evidence of title, conclusive for the purposes of such an action as this unless in some way questioned or impeached. 19 Cyc., 941.

There is no error, and the judgment for plaintiff is affirmed.
No error.

FRANCIS S. COXE ET AL., TRUSTEES AND EXECUTORS, v. K. J. CARPENTER ET AL.

(Filed 3 December, 1911.)

Adverse Possession—Title—Evidence.

The defendant having shown, in deraigning his title, a grant from the State to him of the *locus in quo*, the plaintiff introduced evidence tending to show that the land was unfit for cultivation and that for more than twenty years next before the commencement of the action his tenants had continuously used it for "timber, wood, pine," and that they "would cut wood there nearly every day," that being the only purpose for which it was available; that the plaintiff had cut roads through the lands which his tenants had used, as well as other roads theretofore cut; that plaintiff was using it for its timber and for the purpose of subsequently getting a water supply therefrom: *Held*, evidence of adverse possession sufficient to ripen defendant's title, for the determination of the jury. *Berry v. McPherson*, 153 N. C., 4, cited and applied.

APPEAL by defendants from *Councill, J.*, at April Term, 1911, of POLK.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

This was an action of trespass *quare clausum fregit.* The plaintiffs relied upon color of title and adverse possession. The defendants introduced a grant from the State, which covers the *locus in quo,* but did not connect themselves with it, so that it had the effect only of showing that the title was out of the State. There was evidence tending to show that the plaintiffs and those under whom they claim had been in the actual possession of the land for more than thirty years, claiming it as their own. The witness John Pack testified that he had lived on the Coxe plantation a little over twenty years, and has known the land in dispute for more than twenty years. Col. Frank Coxe had possession of it when he first knew it, and used it for "timber, wood, pine, and such" and would cut wood there nearly every day—firewood and stove wood. There was a great deal of chestnut timber on the land and Coxe got boards and rails from the land every once in a while. The witness cultivated a portion of the other part of the Elwood land, and lived on it thirteen years as a tenant of Colonel Coxe; cultivated it part of the time, and while he lived there he got all the wood he needed from the land in dispute every year, as did the other tenants of Colonel Coxe. The witness also stated that the land in dispute was not cleared, it being ordinary timber land and "mighty little" of it could be cultivated; it was rough land and "some of it you could not stand upon without holding to the bushes"; the land was poor and Coxe had been cutting timber on it all these years; he opened and laid out roads on it in order to haul the wood off; one of the roads was there when he first took possession. There was much other evidence of the same kind. There also was evidence that the land was not fit for cultivation, but was only useful and valuable for its timber; it could not be cultivated profitably, and also that Coxe was using it, as indicated, for its timber and reserving it for the purpose of subsequently getting a water supply, it being in evidence that he had run a level on the branch to see if there was fall enough to the place he lived so that he could utilize the water, which he found to be the case. The case was submitted to the jury under an instruction as to what would constitute, in law, adverse possession, and the only question, as was admitted on the argument, is whether the facts we have stated, if found by the jury, were sufficient to constitute such possession. The jury rendered a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

S. Gallert for plaintiff.
Smith & Shipman for defendant.

WALKER, J. The material issue in this case is easily apparent from the state of the proof and the admissions in the record. Plaintiff did not have a paper title for the *locus in quo,* but relied solely upon his color of title and adverse possession. Defendants introduced a State grant for the land, but did not connect themselves with it. The only effect of this evidence was to show that the State claimed no interest in the land, and to relieve the plaintiffs from the necessity of showing that fact. But it is conceded that our decision must turn upon the character of plaintiff's possession as being, or not, adverse and sufficient, in law, to ripen his color into a good and perfect title to the land. The evidence tends to show that the land was very barren and only fit for use as timber-land. A large part of it was so steep and declivitous that it was necessary to hold to the bushes in order to stand and "keep your equilibrium." There was other evidence to the effect that the land was in the possession of plaintiff, and those under whom they claimed, for many years—at least thirty—and that Colonel Coxe, who claimed the land, it does not appear under what title, except the color, occupied the land with those rightfully claiming under him, and asserted dominion over it for more than the period required by law to ripen the title; that he did not clear or cultivate any part of the land, because it was not fit for cultivation or clearing. It was mostly wild and unarable land and only useful and valuable for the timber. It was further in evidence that Colonel Coxe, his tenants and those claiming under Coxe, for many years cut timber, for the purpose of making it into lumber, and also for firewood and housebote. The witness described this user as being for "timber, wood, boards, pine, and such," and this was an everyday occurrence, and roads, already there, were used and new ones laid out for the purpose of utilizing the land in its then state and condition. His tenants got firewood and stove-wood from the land in the same way.

There is no doubt but that the possession, if adverse, was open, visible, notorious and continuous, and no owner of the land could have failed to take notice of it as an assertion against his title, from the very beginning. There was also evidence that the plaintiff and those under whom they claimed "had possession of the land" for more than seven years.

We think this case is governed by *Berry v. McPherson,* 153 N. C., 4. There are two propositions decided in that case, which we take from the headnotes.

1. "The testimony of the plaintiff, unexplained and uncontradicted upon cross-examination, that he and his father had been in possession of the *locus in quo* for thirty years, in order to show possession under color of title as against the State under deeds he had introduced in evidence, is sufficient to go to the jury."

2. "While the evidence of title by adverse possession must tend to prove the continuity of possession for the statutory period in plain terms or by 'necessary implication,' it is sufficient to go to the jury if it was as decided and notorious as the nature of the land would permit."

We may well show the application of the principles, settled in that case, to those which have been established in the case at bar, in referring generally to what was said by the Court, through *Justice Brown:* The evidence of plaintiff in the case was, that "there is an island about midway of his possession and a road leading across the swamp to the island; that he and his father kept up this road; that there was a road leading across the woods to the island for a third of the way from which he and his father regularly got firewood; that his father sold timber off the land in controversy, and that six years ago defendant cut timber on this land and promised to pay plaintiff for it; that on one occasion defendant, in presence of plaintiff and his brother, recognized plaintiff's possession by admitting the cedar corner claimed by plaintiff to be the true division corner. Plaintiff further testified that tenants on his farm cut wood on this land whenever they needed it, and that he had cut and sold shingles off it frequently, and his father had cut and sold railroad ties. Plaintiff further stated that he sold pine timber off the land and allowed the neighbors to get wood off it whenever they desired. The land in controversy appears to be swamp land, uninclosed and with no habitation upon it. The evidence indicates that plaintiff and his father, for more than thirty years, exercised acts of dominion over the land, and made from it the only profits and use of which it is susceptible. From the evidence of the witness the jury may well infer that these acts were those of ownership and not those of an occasional trespasser, and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit, and offered unequivocal indication that plaintiff and his father were exercising the dominion of owners and were not pillaging as trespassers. *Williams v. Buchanan*, 23 N. C., 535; *Tredwell v. Reddick*, 23 N. C., 56; *Hamilton v. Icard*, 114 N. C., 538; *Simpson* *v. Blount*, 14 N. C., 34; *Baum v. Shooting Club*, 96 N. C., 310. It is true that in proving continuous adverse possession under color of title, nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period either in plain terms or by 'necessary implication.' *Ruffin v. Overby*, 105 N. C., 83. This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible. *Ruffin v. Overby, supra; McLean v. Smith*, 106 N. C., 172; *Hamilton v. Icard, supra*. While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance in the proof." This is practically a motion by the defendant to nonsuit the plaintiff. We are of the opinion that there was sufficient proof of facts showing adverse possession, and the case was properly submitted to the jury for their consideration. There was consequently no error in the rulings of the court.

No error.

W. J. WRIGHT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 November, 1911.)

Carriers of Goods—Failure to Furnish Cars—Interpretation of Statutes.

No substantial error is found on appeal in this case for damages against the carrier for failing and refusing to furnish cars ordered by the plaintiff for the purpose of moving cordwood from a certain siding.

APPEAL from *Cline, J.*, at August Term, 1911, of SAMPSON.

Civil action. These issues were answered by the jury:

1. Did the defendant wrongfully fail and refuse to furnish the cars ordered by him to move his cordwood from the siding between Mints and Parkersburg, as alleged? Answer: Yes.

2. What damage, if any, has plaintiff sustained? Answer: $250.

From the judgment rendered the plaintiff and defendant both appealed.

Faison & Wright for plaintiff.
Junius Davis for defendant.

PER CURIAM. Upon an examination of the record and assignments of error of both plaintiff and defendant in this case we are of opinion that the court below committed no substantial error, and that the case has been fairly and correctly tried.

No error.

Same case, defendant's appeal, we find

No error.

HARRIET J. GROVES v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 27 November, 1911.)

Insurance—Policy—Procurement by Fraud—Waiver—Measure of Damages.

The principles heretofore decided in *Wilson's case*, 155 N. C., 173, and that line of cases, control the decision in this case upon the questions of the procurement by false and fraudulent representations by the agent of the insurer of the taking out of a life insurance policy, or a waiver by the insured, and the measure of damages.

APPEAL from *Adams, J.*, at July Term, 1911, of MECKLENBURG.

Civil action to recover damages or premiums paid on a policy of life insurance issued by the defendant company.

These issues were submitted:

1. Was the application for the policy of insurance on the life of Harriet Groves, wife of Henry Groves, procured by the false and fraudulent representations of the defendant's agent, as represented? Answer: Yes.

2. Did the plaintiff waive her right to rely upon said fraudulent representations? Answer: No.

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $26, with interest at 4 per cent from maturity.

From the judgment rendered defendant appealed.

F. M. Redd and Thomas W. Alexander for plaintiff.
Cameron Morrison and J. H. McLain for defendant.

PER CURIAM. We have examined with care the record, the evidence, and the assignments of error in this case; also in case of H. L. Groves against same defendant, in which a judgment for $52 was rendered, and also in case of Addie May Groves against same defendant, in which judgment was rendered for $26.

As stated upon the argument, the three appeals present the same controversy. We have examined with especial care the brief of the learned counsel for defendant.

We are unable to differentiate in any way these appeals from the other cases against same defendant.

In trying the case, we think his Honor followed the adjudications we have heretofore made. *Caldwell v. Insurance Co. of Va.,* 140 N. C., 100; *McGowan v. Insurance Co. of Va.,* 141 N. C., 367; *Austin v. Insurance Co. of Va.,* 148 N. C., 24; *Jones v. Insurance Co. of Va.,* 153 N. C., 388; *Wilson v. Insurance Co. of Va.,* 155 N. C., 173.

No error.

H. W. WHITENER v. C. C. AND O. RAILROAD COMPANY.

(Filed 13 December, 1911.)

Negligence—Action—Evidence—Nonsuit.

When it appears that an injury, the subject of an action for damages, was the result of an accident concerning which the evidence fails to account, a judgment of nonsuit is proper.

APPEAL from *Long, J.,* at July Term, 1911, of MCDOWELL.

Civil action for personal injury. The action was brought to recover damages for personal injury received from a piece of rock striking plaintiff in the eye while driving crushed ballast under the railroad ties with a tamping pick.

His Honor sustained defendant's motion to nonsuit and dismissed the action. Plaintiff appealed.

Pless & Winborne for plaintiff.

Hudgings & Watson, A. Hall Johnston, and J. Norment Powell for defendant.

PER CURIAM. Upon a review of the record in this case we are of opinion that his Honor correctly sustained the motion to nonsuit. *House v. R. R.,* 152 N. C., 397, and cases cited; *Dunn v. R. R.,* 151 N. C., 313. The injury was evidently the result of an accident, which the evidence fails to account for. *Martin v. Manufacturing Co.,* 128 N. C., 264.

Affirmed.

S. W. CULVER v. R. D. JENNINGS.

(Filed 6 December, 1911.)

1. **Reference—Findings—Evidence—Appeal and Error.**
   Findings of the referee approved and adopted by the judge upon any competent evidence are not reviewable on appeal.

2. **Deeds and Conveyances—Breach of Contract—Damages—Attorney's Fees.**
   As to whether the plaintiff is chargeable with costs and attorney's fees as damages for the breach of warranty of title to land set up in his counterclaim, see, as controlling, *Wiggins v. Pender*, 132 N. C., 628; *Jones v. Balsley*, 154 N. C., 61.

APPEAL from *Long, J.*, at Spring Term, 1911, of WATAUGA.

Civil action heard upon exceptions to the report of J. C. Fletcher, referee.

The reference was by consent. Exceptions were filed by plaintiff. His Honor overruled all the exceptions, and affirmed and approved the findings of fact and rendered judgment against the defendant for $70.76 and adjudged that to be a lien on the land described in pleading, and also gave judgment against defendant for the additional sum of $10.05 due on open account.

The plaintiff appealed.

T. L. Love and T. A. Love for plaintiff.
L. D. Lowe for defendant.

PER CURIAM. All the exceptions to the referee's report except one are to his findings of fact. As such findings upon examination were approved and adopted by the judge of the Superior Court, and as there is some evidence to support them, the action of his Honor will not be reviewed by this Court.

The only exception to any conclusion of law which we find in the record presents the question as to whether the plaintiff is chargeable with costs and attorney's fees as damages for the breach of warranty of title to land set up in his counterclaim.

This is expressly decided in *Wiggins v. Pender,* 132 N. C., 628; *Jones v. Balsley,* 154 N. C., 61.

Affirmed.

THE JOHN CHURCH COMPANY v. E. S. DAWSON AND S. P. WILLIS, TRADING AS E. S. DAWSON & CO.

(Filed 6 December, 1911.)

1. **Reference—Findings of Fact—Evidence—Appeal and Error.**
The findings of fact by the referee upon competent evidence, confirmed by the trial judge, are not reviewable on appeal.

2. **Same—Exceptions—Error Assigned—Procedure.**
The Court will not review exceptions of law to a referee's report unless they are passed upon by the trial judge and unless the judge's rulings are especially assigned as error in the transcript on appeal sent to the Supreme Court.

3. **Courts — Discretion — Counterclaim—Amendments—Appeal and Error.**
The filing of an amended answer setting up a counterclaim is in the discretion of the trial judge and is not reviewable on appeal.

4. **Pleadings—Counterclaim—Principal and Agent—Contract—Subject-matter.**
In an action relating to dealings between a principal and his sales agent, a counterclaim is properly set up when its subject-matter grew out of and related to the dealings between the parties or the contract of employment.

5. **Reference—Trial by Jury—Exceptions—Issues Tendered—Procedure.**
A party to a compulsory reference should not only have proper exceptions entered, but tender the issues arising from the evidence and attach them to his exceptions to the referee's report when he desires to preserve his right to a trial by jury thereon.

6. **Reference—Exceptions Abandoned Below—Waiver.**
Exceptions to a referee's report abandoned before the trial judge are deemed as waived on appeal.

7. **Appeal and Error—Exceptions, Broadside.**
An exception to the judgment of the lower court affirming the referee's report is a broadside exception, and will not be considered on appeal.

APPEAL from *O. H. Allen, J.*, at May Term, 1911, of BEAUFORT.

Civil action heard upon the report of Referee C. H. Harding, upon exceptions filed by both parties.

The original reference was compulsory as to plaintiff, but on the hearing before the Superior Court a trial by jury was waived and by consent the judge passed upon the exceptions to the findings of fact by referee as well as upon his conclusions of law.

His Honor adopted all the findings of fact of the referee except in respect to the fourth and eleventh findings. In these the court made some changes in the figures and amounts as stated by the referee. His Honor overruled all other exceptions to findings of fact.

His Honor affirmed the third, fourth, and fifth conclusions of law of the referee and modified the first and second conclusions of law. The court rendered judgment against plaintiff in favor of the defendant for $1,144.96 and costs. The plaintiff appealed.

Wiley C. Rodman for plaintiff.

Small, MacLean & McMullan and Ward & Grimes for defendant.

PER CURIAM. We have examined this record with care and find that the controversy involves a statement of account between plaintiff and its former agents in regard to the sale of pianos. The controversy is one over facts almost exclusively, and his Honor's findings of fact are binding upon us, there being sufficient evidence to support them. The conclusions of law necessarily follow from the facts as found.

There are six assignments of error set out at end of case on appeal. This Court does not review exceptions of law to a referee's report unless they are passed upon by the judge and unless the judge's rulings are especially assigned as errors in the transcript on appeal sent to this Court.

1. The defendants were allowed to file an amended answer setting up a counterclaim. This was a matter within the discretion of the court, and is not reviewable. The counterclaim is a proper one, because it not only grew out of and related to the dealings in pianos between plaintiff and defendant, but it arises out of contract also. Revisal, sec. 481, subdiv. 2.

2. The court ordered a compulsory reference. This would have entitled plaintiff to a jury trial on the issues of fact raised by exceptions to the report, but it was plaintiff's duty to tender the issues arising and attach them to his exceptions to the report; but plaintiff abandoned that right when in open court a jury trial was waived.

3. Assignments of error numbers 3, 4, and 5 relate to evidence, which we think was properly admitted and that it is useless to discuss.

The sixth assignment of error is in these words: "The court, on the hearing upon the referee's report, signed the judgment as set out in the record.

This is a broadside exception to the judgment, and presents no question of law for our review.

The judgment is

Affirmed.

RITTER LUMBER COMPANY v. GEORGE W. MOFFITT.

(Filed 20 December, 1911.)

1. **Objections and Exceptions—Broadside Exceptions—Appeal and Error.**

   An exception to the entire charge, containing several distinct propositions and much evidence, upon an issue, without specifying the errors complained of, will not be considered on appeal.

2. **Contracts, Written—Collateral Agreement — Consideration — Nudum Pactum.**

   The plaintiff sued under a written contract made with defendant by which the defendant was to skid logs on double-deck skids, along the skidway over a tram, without stipulation in regard to the time when the logs were to be taken off the skids by the plaintiff. The defendant alleged damages arising independent of the contract, for plaintiff's failure, under a collateral agreement, to remove the logs from the skidway at his mills, thereby causing damages to defendant. In this case a charge was held correct that as there was nothing in the written contract sued on in regard to the time the plaintiff was to remove the logs, the issue as to defendant's damages in reskidding the logs should be answered in plaintiff's favor.

3. **Objections and Exceptions—Contentions—Evidence—Appeal and Error.**

Exceptions to the statement of the trial judge of the contention of the parties upon the evidence are not reviewable on appeal.

APPEAL from *Cline, J.*, at Spring Term, 1911, of MACON.

The plaintiff alleges in its complaint that on 2 May, 1908, the defendant executed his five notes, by which he promised to pay the plaintiff, in the aggregate, $987.84, and that on the same day he executed certain chattel mortgages to secure the payment of the same.

The defendant, in his answer, admits the execution of the notes and mortgages, and alleges, by way of counterclaim, that he and the plaintiff had entered into a logging contract, which the plaintiff had failed to perform, and that he had been damaged thereby.

Separate issues were submitted to the jury on the items of damage alleged in the answer, all of which were answered in favor of the defendant, except the third, as to reskidding logs.

The allegation of the answer, in reference to reskidding, is as follows:

"2. And that the said plaintiff agreed with this defendant to keep the tramroads running and to remove all logs as fast as they were skidded, and this the said plaintiff failed and refused to do, so that this defendant was compelled to reskid about 1,000,000 feet of logs, to his great damage, to wit, in the sum of $750," and the parts of the written contract relating thereto are: "The said party of the first part (Moffitt) agrees to cut all of said trees and timber into mill lengths of 12, 14, and 16 feet long, allowing on each log 4 inches to square the lumber, and will deliver the same at such place on the double-deck skidways along the tram as may be designated by the said party of the second part (the lumber company).

"The trees and timber cut and delivered as aforesaid shall be inspected and measured according to 'Lumberman's Favorite Log Scale Rule,' and all logs shall be measured at the small end, under the bark, narrow diameter, and all logs shall be delivered on the tramroad skidways, which are to be double-deck skidways, and shall be scaled at the mill."

The defendant, among other things, testified: That he and the plaintiff executed the contract set out and attached to and made a part of the defendant's answer, and that this was the only written contract about the transaction. That pursuant to the terms of said contract he commenced to build skidways along the line of tramway mentioned in said contract, the tramroad not being built at that time, but had been definitely marked out and surveyed and pegs placed along the line of survey; that he built a hundred or more skidways along the line of the tramway that had been surveyed; that some of the skidways were double-decked and some single-decked. He admitted it was his duty to construct the skidways provided for in the contract, upon which the logs were to be delivered.

He further testified that, independent of the written contract, the defendant agreed to have the logs removed to the mill as fast as the defendant put them on the skids, and thus keep the skidways clear, and that it failed to do so, and that the skidways were consequently filled up with logs, and defendant was compelled to drag about a million feet of the logs into the vicinity of the skidways and leave them there, and then when the skidways were cleared of logs defendant was obliged to take his hands and cattle back and reskid this million feet or hire other parties to do this for him; that is to say, to put these logs on the skidways in position to be loaded on the tramcars, and that this necessitated an additional expense of 50 cents a thousand to the defendant to reskid this million feet, or a total of $500, which the plaintiff had not paid him for.

From a judgment rendered in accordance with the issues, the defendant appealed.

Johnston & Horn and L. C. Bell for plaintiff.
J. Frank Ray and Robertson & Benbow for defendant.

Per Curiam. There are seven exceptions in the record, all of which are formal, except three to parts of the charge.

The first of these must be disregarded, because it is to the whole charge on the third issue, which covers three and a half pages of the printed record, and contains several distinct propositions, and the errors complained of are not pointed out. *Gwaltney v. Assurance Society,* 132 N. C., 929.

The second is to the part of the charge on the third issue, as follows: "The defendant obligated himself in this contract to skid logs, and on double-deck skids, along the skidways over the tram, and, as the court thinks, there is nothing in the written contract in regard to the time when the logs would be taken off the skidways by the lumber company; and so I charge you that, nothing else appearing, the defendant could not recover anything under this issue."

An examination of the contract shows that there is no stipulation requiring the plaintiff to move the logs from the skidway in any particular time, and if the defendant relied on the contract alone, there could be no recovery on this item of damage, as stated by his Honor, as the evidence shows that the defendant did not rely upon the position that under the contract the plaintiff could not unreasonably delay the removal of the logs, but on an independent agreement between him and the plaintiff.

This question was submitted to the jury under proper instructions.

The third exception is to the statement of the contentions of the parties, all of which arose on the evidence.

Upon an examination of the whole record, it appears to us that the case has been tried impartially and that there is no error.

No error.

A. N. FISHER v. CHAMPION FIBER COMPANY.

(Filed 20 December, 1911.)

Held, in this case, a judgment of nonsuit upon the evidence was properly denied the defendant, and that the charge of the court followed well-settled principles of law.

APPEAL from *Carter, J.,* at May Term, 1911, of BUNCOMBE.

Civil action. These issues were submitted:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. Was the plaintiff guilty of negligence which contributed to his said injury?

3. Did the plaintiff assume the risks of being injured at the time mentioned, as alleged in the answer?

4. What damages, if any, has the plaintiff sustained?

The jury answered the first issue "Yes," the second issue "No," the third issue "No," and the fourth issue "$1,150."

From the judgment rendered defendant appealed.

Craig, Martin & Thomason for plaintiff.
Martin & Wright for defendant.

PER CURIAM. We have examined the twenty assignments of error set out in the record, all of which, except the motion to nonsuit, relate to the charge of the court.

The majority of the Court are of opinion that the motion to nonsuit was properly overruled and that the charge follows the well-settled decisions of this Court.

No error.

W. L. HENRY ET AL. v. W. L. HILLIARD ET AL.

(Filed 23 December, 1911.)

1. **Judicial Sales—Trustees—Commissions—Agreement—Subsequent Agreement—Interpretation of Contracts.**

   In this case, *Held,* that a trustee of the funds arising from the sale of certain lands under judicial proceedings should not be entitled to certain commissions under an agreement entered into with the parties in interest, for the reason that these commissions were included under a certain other and subsequent agreement in a larger sum for his full services.

2. **Judicial Sales—Trustees—Commissions—Agreement — Report — Interpretation of Contracts.**

   An agreement entered into by the parties and a trustee appointed by the court to hold and disburse the proceeds of sale of lands under judicial proceedings, which specifies that the report of the trustee "is considered as correct as to all debts and credits that have passed through his hands, except as modified by this agreement," does not authorize a commission claimed by the trustee in his report which the agreement itself includes in a larger amount for full commissions which are to be paid him.

3. **Judicial Sales—Trustees—Order of Court—Disbursements in Excess.**

A trustee appointed by the court in judicial proceedings to hold and disburse moneys arising from the sale of lands is not entitled to a credit of a larger amount paid to certain parties in interest than ascertained and fixed by an order in the case made by the court, as a payment in excess of that sum is made without authority.

APPEAL from *Cline, J.*, at January Term, 1911, of HAYWOOD.

The facts are sufficiently stated in the *per curiam* opinion of the Court.

Civil action heard on exceptions to report of referee.

From rulings of his Honor, modifying report, and judgment thereon as modified, R. D. Gilmer, trustee, excepted and appealed.

W. T. Crawford for plaintiff.
Walter Clark, Jr., for defendant.

PER CURIAM. This was a civil action involving the settlement of what is termed in the record the "Love estate." Pending the proceedings, on motion of Hon. R. D. Gilmer, trustee of funds belonging to the estate arising from sale of certain lands in Haywood, Jackson, and adjoining counties, report was made and, on exceptions filed, the questions involved were referred by order of court to M. W. Bell, Esq., who heard testimony and made report containing his findings of fact and conclusions of law in the case. Exceptions having been made to this report, present judgment was entered at January Term, 1911, and the trustee, as stated, excepted and appealed.

The objections made to the validity of the judgment are, first, that the trustee is charged with the sum of $669.30 commissions heretofore retained by him on a sale of certain lands in Jackson County made in the year 1900 under and by virtue of a written agreement as to fees, had and made between the trustee and two of the beneficiaries of the estate with the sanction of a majority of the *cestui que trusts* in 1894. This item was no doubt charged against the trustee for the reason that under another agreement entered into between all the parties of record on 30 June, 1908, subsequent to the one before mentioned, it was stipulated that the trustee should receive the sum of $6,500 in full for all services since 1898, and might retain all amounts allowed him for services before that time. The sale under which this charge is made took place, as stated, in 1900, and the commissions therefore are covered by agreement for $6,500, and was therefore not a proper charge.

It is claimed for the trustee that this objection is not open, because the parties had also agreed that the report filed by the trustee, in which this item appeared as a proper credit, should be taken as correct, but we do not think this a correct position. The agreement in the particulars referred to expressly states that the report of the referee "is to be considered as correct as to all debts and credits that have passed through the hands of said Gilmer, *except as modified* by this agreement as to charges for services rendered by said Gilmer."

The objection, therefore, was open to the appellees by the express provisions of the agreeement.

Again, it was objected that the trustee had been credited only with the sum of $5,500 as the amount properly paid by him to the heirs of William Welch, whereas the facts showed that the trustee paid these heirs the sum of $6,174.17. The answer is that the amount due these heirs had been fixed by a decree of the court made in the cause at the sum of $5,500, and there is no authority appearing for a payment of any amount in excess of that sum.

We find nothing in the record that would justify the Court in disturbing the conclusion reached by his Honor, and the judgment entered by him is therefore

Affirmed.

B. B. KELLER v. THE CHAMPION FIBER COMPANY.

(Filed 23 December, 1911.)

1. **Appeal and Error—Assignments of Error—Placing.**
The exceptions grouped and relied on by the appellant in the Supreme Court are properly placed at the end of his case on appeal.

2. **Negligence—Contributory Negligence—Questions for Jury.**
Whether the brakeman on defendant's train was guilty of contributory negligence or whether the plaintiff was negligent in this case, are for the jury, the evidence on plaintiff's part tending to show that the injury was inflicted by the defendant's negligence in sending cars down a heavy grade of track without proper brakes or an engine attached.

3. **Evidence—Contributory Negligence—Nonsuit.**
A motion to nonsuit on the issue of contributory negligence can only be sustained when the facts necessary to constitute contributory negligence are established by the evidence of the plaintiff.

APPEAL from *Cline, J.*, at May Term, 1911, of JACKSON.

These issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his own injury? Answer: No.

3. What damage is plaintiff entitled to recover? Answer: $6,000.

From the judgment rendered the defendant appealed.

Walter E. Moore and Moore & Rollins for plaintiff.

P. H. C. Cabell, Martin & Wright, Bourne, Parker & Morrison, Bryson & Black for defendant.

PER CURIAM. The plaintiff moved the Court to dismiss the defendant's appeal for the reason that the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal, as required by Rules 19 and 21 of this Court (140 N. C., 660).

The Court is of opinion, upon an examination of the record, that the assignments of error are properly placed at end of case on appeal, and that assignments Nos. 1 and 2, relating to the refusal to sustain the motions to nonsuit the plaintiff, are properly assigned and worded and that defendant is entitled to have them passed upon by the Court. But the majority of the Court is of opinion that the remaining assignments, all of which relate to the charge of the judge and the refusal to give special instructions asked by defendant, are not fully or properly assigned, and come within the rulings of this Court in *Thompson v. R. R.,* 147 N. C., 413; *Lee v. Baird,* 146 N. C., 361; *Smith v. Manufacturing Co.,* 151 N. C., 260.

Taking into consideration the motions to nonsuit, the Court is of opinion that they were properly denied.

There is much conflicting evidence upon the material issues of fact, but the evidence of the plaintiff tends to establish that he was brakeman on defendant's logging railroad; that in March, 1910, the defendant's superintendent directed plaintiff to let a string of eight cars, heavily loaded, run down the mountain incline grade without an engine attached; that in obedience to orders, plaintiff did so; that the cars ran into a cow and pushed it some distance on track and were then derailed, in consequence of which plaintiff was seriously injured; that had the engine been attached it could have controlled the cars and the derailment would not have occurred; that the brakes were defective, out of order, and failed to stop the cars when applied; that plaintiff was furnished with only one person to assist in controlling the cars, and that was insufficient in the absence of the engine.

Upon the issue of contributory negligence, the Court is of opinion that motion to nonsuit can only be sustained when the facts necessary to constitute contributory negligence are established by the evidence of the plaintiff. In this case the evidence offered by plaintiff does not of itself make out contributory negligence upon his part. On the contrary, it tends strongly to rebut such defense.

The judgment of the Superior Court is
Affirmed.

C. H. REXFORD ET AL. v. JOHN H. MARTIN ET AL.

(Filed 23 December, 1911.)

Appeal and Error.

The questions in this case of color of title, adverse possession, and competency of evidence: *Held*, to have been decided correctly in the court below, and no error is found.

APPEAL from *Cline, J.*, at March Term, 1911, of SWAIN. Plaintiffs appealed.

W. L. Taylor, Bryson & Black, and Frye & Frye for plaintiff.

John W. Hinsdale for defendant.

PER CURIAM. This case has received a careful examination, and we are of the opinion that no substantial or reversible error, if error at all, was committed during the trial. It is plain that the defendants had good color of title, and the case turned largely upon their possession, that is, whether it was sufficiently adverse, notorious, continuous, etc., to ripen their color into a good and valid title, and we entertain no doubt upon this branch of the case. The evidence as to who claimed the land was competent and relevant to show the beginning of the possession, its notoriety and continuity, and if any of the questions or answers were incompetent, as contended by plaintiffs, we do not see that any error in this respect was prejudicial. In view of the facts, it must certainly be considered as harmless. We do not intend even to intimate that there was error. The substantial merits are clearly with the defendants, and the jury, under an exceedingly fair and proper charge, have found the issue of fact against the plaintiffs, and their verdict, in our judgment, should not be disturbed.

No error.

STATE v. TURNER SMITH.

(Filed 9 November, 1911.)

1. **Rape—Assault with Intent—Assault on Woman—Interpretation of Statutes—Proviso—Age—Indictment—Allegations—Defense.**

By statute, Revisal, 3620, as amended by the Laws of 1911, ch. 193, the punishment for "assaults, assaults and batteries, etc.," is limited to a fine not exceeding $50 or imprisonment of thirty days in certain instances: *Provided*, among other things, that it shall not apply to an assault by a man, or by a boy over eighteen years of age, upon a woman: *Held*, it is for the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over that age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged.

2. **Same—Habeas Corpus.**

The prisoner was convicted and sentenced to the county jail for a term of two years and assigned to work on the public roads under the provisions of Revisal, sec. 3620, for assaulting a woman. After submitting to his sentence and serving thirty days of it, he sued out a writ of *habeas corpus*, claiming that the sentence was excessive, on the ground that the bill of indictment had not alleged that he was more than eighteen years of age at the time of the commission of the offense, and therefore, having worked out his lawful sentence, he should be discharged. The court construes together Revisal, sec. 1427, relating to the jurisdiction of courts of justices of the peace in their counties, when no deadly weapon is used; section 3268, providing that "on a trial of any person for rape, when the crime charged shall include an assault upon the person," and there is a conviction of the less offense, "the court shall have power to imprison the defendant, if found guilty of an assault, for any term now allowed in cases of conviction when the indictment was originally for an assault of like character," and said section 3620, and holds that, upon conviction of a simple assault and battery upon a woman, without alleging an intent to commit rape, the prisoner, over the age of eighteen years, can be punished at the discretion of the court, without any allegation in the bill as to his age, it being a matter for him to show, if the fact existed, that he was not over the age specified, which, if proven, would except him from the general provisions of section 3620.

3. **Rape, Assault on Woman—Intent—Allegations—Age—Indictment—Defense—Interpretation of Statutes.**

When an indictment charges an assault with the intent to commit rape, the prisoner may be convicted of an assault upon a woman (Revisal, sec. 3268); and if it is found that he was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not. Revisal, secs. 3268, 3620.

4. **Assault—Indictment—Conviction of Less Offense—Issues—Punishment.**

Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment.

5. **Indictment—Assault—Rape—Jurisdiction Concurrent—Magistrate's Cognizance—Burden of Proof.**

It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the Superior Court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission"; for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. Revisal, sec. 1427.

APPEAL in *habeas corpus* proceedings from *Mr. Justice Allen,* from WAKE, 1911.

The facts are sufficiently stated in the opinion of the Court by *Mr. Justice Walker.*

Attorney-General Bickett and Assistant Attorney-General G. L. Jones for the State.

J. C. L. Harris, Chas. U. Harris, and Aycock & Winston for defendant.

WALKER, J. The defendant was indicted in the Superior Court for an assault with intent to commit rape, and was convicted by the jury, not of the felony charged in the indictment, but of an assault and battery upon a woman, he being, at the time of the assault, over the age of eighteen years. The indictment alleged that "the defendant, with force and arms, at and in the county aforesaid, in and upon one Lillian Whitson, then and there being, did make an assault, and her, the said Lillian Whitson, then and there, did beat, wound, and ill-treat, with intent her, the said Lillian Whitson, violently and against her will then and there, feloniously to ravish and carnally know, and other wrongs to the said Lillian Whitson then and there did, against the form of the statutes in such case made and provided, and against the peace and dignity of the State." Upon the verdict, the court below rendered judgment that the defendant be imprisoned in the common jail of Wake County for the term of two years, and assigned to work on the public roads of said county, his earnings during said term, as allowed by the commissioners of the county, to be applied to the payment of the costs. The defendant did not appeal from that judgment, but submitted thereto, and having served for thirty days on the roads and performed the judgment to that extent, he applied by petition for the writ of *habeas corpus* to *Hon. W. R. Allen,* one of the justices of this Court, and alleged that the sentence of the court was excessive, upon the ground that the indictment failed to allege that, at the time of the assault, he was more than eighteen years old, and that, therefore, the Laws of 1911, ch. 193, do not apply, as that was an essential averment to be made in order to warrant the punishment inflicted, the finding of the jury as to his age not being allowed by law to aid the indictment in that respect.

Judge Allen, at the hearing of the petition, dismissed the proceeding and remanded the defendant, holding that it was not necessary for the indictment to allege that the defendant, at the time he committed the assault, was over the age of eighteen years, and in this conclusion we unhesitatingly concur, although it may require a very careful and minute examination of our statutes, and the authorities bearing upon the subject, in order to clearly demonstrate the fallacy of the defendant's position.

The defendant was indicted, as we have seen, for an assault with intent to commit rape, and by the verdict was convicted of an assault upon a woman, he being then over the age of eighteen years. The allegations of the bill gave the court jurisdiction to try the case and to pronounce such a judgment as was authorized by law. As *Judge Ashe* observed, and subsequently repeated in *S. v. Moore,* 82 N. C., 660: "This kind of litigation would not recur if the Legislature would take the subject in hand and free it of its many complexities and ambiguities. A statute or statutes intended to prevent or to cheapen litigation, or to speed the trial of cases, or to more adequately prevent crimes, should not defeat the purpose of the enactment by vague and ambiguous terms. There have been many cases brought to this Court to ascertain what the Legislature meant, in its attempt to carry out the following constitutional provision: 'The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of all criminal matters arising within their counties where the punishment cannot exceed a fine of $50 or imprisonment for thirty days.'" The statutes relating to this subject have not been so codified in the Revisal as to remove the doubts and uncertainties suggested by this Court in its former decisions, although it has been said that certain statutes which were *in pari maturi* should be construed together so as to ascertain the true legislative intention. But let us look at the statutes pertinent to this question: Revisal, sec. 1427, provides that justices of the peace shall have exclusive jurisdiction of all assaults, batteries, affrays, when no deadly weapon is used and no serious damage is done, and of all criminal matters arising in their counties, where the punishment, prescribed by law, shall not exceed a fine of $50 or thirty days imprisonment, with a proviso preserving the jurisdiction of the Superior Courts when the offense is committed within a mile of the place where the court is held and during its session. It further provides that the section shall not be construed to prevent Superior Courts from assuming jurisdiction of offenses whereof original jurisdiction is given to justices of the peace, if some justice of the peace, within twelve months after the commission of the offense, shall not have taken official cognizance of the same.

Revisal, sec. 3620, as amended by Laws of 1911, ch. 193, provides as follows: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided*, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of $50 or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape, or to cases of assault or assault and battery by any man or boy over eighteen years of age on any female person."

It was argued by the learned counsel of defendant that it is necessary to consider the statutes above mentioned and as explained by Revisal, sec. 3268, which is as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when (if) the indictment was (had been) originally for an assault of a like character."

Discarding all superfluities and rejecting nice distinctions and subtle refinements, and stripping these statutes to the bone, even to the marrow, the real intention of the Legislature is laid perfectly bare and its meaning becomes apparent. It all, therefore, results in this, that a man who is indicted for an assault with intent to ravish, and is convicted of a simple assault and battery upon a woman, without the alleged intent, he being over the age of eighteen years, can be punished at the discretion of the court, without any allegation in the bill as to his age, and cannot shield himself behind the statute conferring jurisdiction on a magistrate of simple assaults, nor limit the punishment, under the first proviso of Revisal, sec. 3620, to a fine of $50 or imprisonment for thirty days, upon conviction in the Superior Court, where, by the statute, it has acquired jurisdiction. It has been held uniformly that, where an exception or even a proviso to the enacting clause of a statute creating an offense is descriptive thereof, it is necessary to negative, in an indictment thereunder, the existence of the facts contained in the exception or proviso, though the burden of proof to establish them may rest upon the defendant. *S. v. Blackley,* 138 N. C., 620. "Where the words contained in a proviso or exception are descriptive of the offense and a part of its definition, it is necessary, in stating the crime charged, that they should be negatived in the indictment, and where the statute does not otherwise provide, and the qualifying facts do not relate to the defendant personally, and are not peculiarly within his knowledge, the allegation, being a part of the crime, must be proved by the State beyond a reasonable doubt." *S. v. Connor,* 142 N. C., 700. Joyce on Indictments, sec. 279, where the law is thus stated: "The general rule as to exceptions, provisos, and the like, is that where the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense. But where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, then it is held that the exception must be negatived." But this case does not fall within that principle. The third proviso was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or a boy over eighteen years old, upon a woman, but it merely excepted that case from the operation of the first proviso, by which the punishment for a simple assault was limited to a fine of $50 or imprisonment for thirty days. It related solely to the degree of punishment for an assault committed upon a woman by a man, or by a boy over eighteen years of age. It was always a crime for a man, or a boy over eighteen years of age, to assault a woman, and the object of section 3620 was to provide that such an offense should be subject to the same punishment, at the discretion of the court, as any other assault, with or without intent to kill or injure or to commit a rape, and not to deprive the court of the discretion given by the first clause, in those cases where the assault was committed with a deadly weapon or with intent to kill or to commit a rape, or where it was upon a woman by a man, or a boy over eighteen years of age. This indictment for an assault with intent to commit rape includes, necessarily, an assault by a man upon a woman, without any regard to the age of the man, and it was not necessary to allege that the defendant was over the age of eighteen years.

It was for the purpose of providing for just such a case as this one that the Legislature passed the act of 1885, ch. 68, to the effect that on the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, the jury may acquit of the felony and find a verdict for the assault against the person indicted, if the evidence warrants such finding; and the statute further provides that where the conviction is for the inferior offense, the court shall have the power to imprison the person, so found guilty of an assault, for any time now allowed by law, where in cases of conviction the like punishment might be imposed if the indictment had been originally for an assault of a like character. The Legislature did not mean to create separate and distinct criminal offenses, such as assault with a deadly weapon, assault with serious damage, assault upon a woman when the man is over eighteen years of age, or any other kind of assault which is aggravated in its circumstances or of serious and lasting damage in its consequences. There is but one offense, the crime of assault, and the varying degrees of aggravation were mentioned only for the purpose of graduating the punishment. To hold otherwise would defeat the manifest intention of the Legislature.

It must be observed that the language of the statute is that if the indictment is for rape, or any felony whatsoever, "and the crime charged shall include an assault against the person," the jury "may find a verdict against the defendant for assault." It does not describe the kind of assault, but refers to an assault generally and without regard to its degree of punishment under the law. If the assault is of that kind which, if committed with intent to ravish or to commit any other felony, would subject him to punishment for the offense so charged, if convicted of the same, then, subject to the rule already stated, he can be punished at the discretion of the court, if convicted of the assault only. Can it be doubted that this assault is of that kind, unless it is held that a man, or boy over eighteen years old, cannot be convicted of an assault with intent to ravish or to commit any other felony? It is best, and certainly safe, that the court should require the jury, under a special issue submitted, to find the facts necessary to determine the grade of punishment, and we strongly commend this practice to the judges. There are one or more cases in which this same suggestion has been made.

The recent decisions in *S. v. Shuford*, 152 N. C., 809, and *Ex parte Holley,* 154 N. C., 163, illustrate the view we have taken. In the last cited case it was held, as it was in the *Shuford case,* that while the statute graded the punishment of larceny according to the value of the stolen goods, it did not create any new offense, and the value of the property taken was not an essential element of the crime, but the provision was inserted in the statute only for the purpose of ameliorating the punishment, if it is shown on the trial by the defendant, or if it otherwise appears, that the goods are of less value than $20. And so in this case, the age of the man is mentioned merely to aggravate the offense and to increase the maximum of punishment. A male infant, under the age of fourteen years is presumed, at common law, incapable to commit a rape; but a boy fourteen years old could, at common law, commit an unlawful assault upon a woman. If he is indicted for the crime, is it necessary to state his age? The courts of all jurisdictions have answered that question in the negative. The matter contained in the last proviso was not intended to be, and is not, descriptive of the offense, as in *S. v. Connor,* 142 N. C., 702; *S. v. Burton,* 138 N. C., 576, but it was intended to leave it to the judge, upon conviction of an assault, to say what the sentence shall be.

The authorities to the effect that it is not necessary to allege the age in the indictment, even where the age of capacity is raised by statute from fourteen years, the common-law limit, to sixteen years or more, are very numerous, the age being held to be a matter of defense. "The office of a proviso generally is, either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it extending to cases not intended to be brought within its purview." Potter's Dwarris on Statutes, p. 118; *S. v. Goulden,* 134 N. C., 743; *Huddleston v. Francis,* 124 Ill., 195; and *Sutton v. People,* 145 Ill., 279, and authorities cited. In that case it is said: "At common law, a boy under fourteen years of age was conclusively presumed incapable of committing a rape, and that strictness is adhered to in some jurisdictions in this country; but it has never been held that, in charging the crime as defined at common law, it was necessary to aver that the accused was, at the time, of the age of fourteen years or upwards," citing 2 Wharton on Criminal Law, sec. 1453; *Commonwealth v. Scannel,* 11 Cush. (Mass.), 547; *People v. Ah Yek,* 29 Cal., 575; *Ward v. State,* 12 Tex. App., 174; *Cornelius v. State,* 13 *id.,* 349.

In *Rex v. Jarvis,* 1 East, 643, *Lord Mansfield* said: "It is a known distinction that what comes by way of proviso in a statute must be insisted on, by way of defense, by the party accused; but where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of them."

It must be borne in mind that the proviso to Revisal, sec. 3620, inserted by Laws 1911, ch. 193, does not refer directly to the enacting clause of the statute, but to a former proviso in the section, which withdrew certain assaults, simple in their character, from the operation of the enacting clause, and the proviso of 1911 was merely passed to prevent assaults by a man, or a boy over eighteen years of age, upon a woman, from being included in the first proviso of the section. It was clearly the purpose of the Legislature to clarify the meaning of the section, and it was not intended to create or define any new offense, but the new clause related exclusively to the degree of punishment for such aggravated assault, it still being an assault as formerly, and by the terms of the last proviso it was placed in the same class with all other assaults, attended with circumstances enhancing defendant's guilt and calling for a greater penalty.

The case of *S. v. Knighten,* 39 Oregon, 63, is so much in point and bears such a close resemblance to the case at bar that we are permitted to quote liberally from it: "The statute provides that, 'If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years,' etc., he shall be deemed guilty of rape. It is argued that under this statute the age of the defendant is an essential ingredient of the crime, and must be averred in the indictment. But, as we understand the statute, its only effect is to raise the age of capacity of the male from fourteen, as it was at common law, to sixteen years. At common law, a boy under fourteen years of age was presumed to be physically incapable of committing the crime of rape, but (as we have seen) it was never held that it was necessary to allege the age of the defendant in an indictment for that crime. 16 Am. and Eng. Enc. Law (1 Ed.), 315; *Commonwealth v. Scannel,* 11 Cush., 547; *Sutton v. People,* 145 Ill., 279 (34 N. E., 420); *S. v. Ward,* 35 Minn., 182 (28 N. W., 192). Nor is it necessary under the statute. If the defendant was below the requisite age, it is a matter of defense. Mr. Bishop says the age of the defendant need not be set out, 'though the statutory words are "any person of the age of fourteen years and upwards, who shall have carnal knowledge." If he is below fourteen, it is simply matter for defense.' Bishop Stat. Crimes (2 Ed.), sec. 482. The statute of California provided that 'any person of the age of fourteen years and upward, who shall have carnal knowledge of any female child under the age of ten years, with or without her consent, shall be adjudged guilty of the crime of rape,' and in *People v. Ah Yek,* 29 Cal., 575, it was held that an indictment silent as to the age of the defendant was good. *Mr. Justice Sawyer,* speaking for the Court, said: 'It does not appear upon the face of the indictment that defendant was under fourteen years of age, and we see no better reason for averring that he is over fourteen than in any other criminal case for averring that the party charged is of such age as to render him capable in law of committing the crime. His capacity to commit the crime is as much an element in the crime in one case as in the other.' See, also, *People v. Wessel,* 98 Cal., 352 (33 Pac., 216). The statute of Vermont also made it an offense punishable the same as rape for a person over the age of sixteen years to carnally know a female person under the age of fourteen years, with or without her consent; and in *S. v. Sullivan,* 68 Vt., 540 (35 Atl., 479), it was held that it was not necessary to allege in the indictment the age of the defendant, but that, if he was under sixteen years of age, it was a mere matter of defense. We are of the opinion, therefore, that the indictment is sufficient."

There are numerous authorities sustaining that view of the law, and several of them are reviewed in the case already cited. *S. v. McNair,* 93 N. C., 628, has some bearing upon the question, although not directly in point. It recognizes that the age of the defendant in such cases as this is a matter for proof by him, if not descriptive of the offense, as in *S. v. Connor, supra.*

But Revisal, sec. 3269, provides that "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime." This language is broad enough to cover the case. Under that section, when the charge is of an assault with intent to ravish, the prisoner may be convicted of an assault upon a woman, and if it is found that he was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, under Revisal, secs. 3268, 3620, whether his age is stated in the indictment or not. *S. v. West,* 39 Minn., 321; *S. v. Baldridge,* 105 Mo., 319; *Bolling v. State,* 98 Ala., 80; *Stopps v. State,* 129 *ibid.,* 101. It has frequently been held by courts in States having statutes substantially like ours, that upon the indictment for an assault with intent to kill, or to commit rape, the defendant may be convicted of an aggravated assault, under a statute creating that as a distinct offense, although it is not by that name alleged in the indictment, it being considered within the description of the other crime which is properly averred. *Pittman v. State,* 25 Fla., 648; *S. v. Robinson,* 31 S. C., 453. But in the case of *S. v. Sullivan,* 68 Vt., 540, the Court held that it was unnecessary to allege the age of the defendant to be over sixteen years, as provided by the statute of that State, and that under an indictment, not alleging such age, for an assault with intent, forcibly and against her consent, to ravish a child less than fourteen years old, a conviction, upon evidence, for an assault under the statute, which provides for the punishment of one over sixteen years of age who carnally knows a female under fourteen years of age, even with her consent, was proper. See, also, *Com. v. Scannel,* 11 Cush., 547; Bishop St. Cr. (2 Ed.), sec. 482; *Wilkinson v. Dutton,* 113 E. C. L. (3 Best and S.), 821.

Several of the States have passed statutes creating a separate and distinct offense by the name of "assault by an adult upon a female," and some of these courts have held that it is necessary, *for that reason,* that the fact of being an adult should be alleged in the indictment, it being a necessary ingredient of the offense. *Blackburn v. State,* 39 N. C., 153. But courts hold, in regard to facts similar to those in this case, and this seems to be the accepted doctrine, that there is a presumption of capacity (*capax doli*) or that a defendant is an adult or of sufficient age to know right from wrong, and it is incumbent upon him to show the contrary, or, at least, that he is under that age, say between seven and fourteen years, when the burden may shift to the State to prove that he actually had the capacity to know the true quality and nature of his act, that is, whether it is forbidden by morality and law or not. This is not like the cases of *S. v. Lanier,* 88 N. C., 658, and *S. v. Wilson,* 101 N. C., 730, in which it was held that an indictment for embezzlement must negative the fact of defendant being an apprentice or under the age of sixteen years. Those exceptions are contained in the body of the enactment, and are descriptive of the offense.

Defendant's counsel argued that, under our numerous decisions, in regard to the jurisdiction of a justice of the peace in criminal matters, it was held to be necessary that the indictment should allege the facts and circumstances showing jurisdiction in the court, as that an assault was committed with a deadly weapon, or with intent to commit a rape, or more than twelve months before the finding of the bill, but that where there is a conviction of a simple assault, even under a bill alleging the use of a deadly weapon or that serious damage was done, the punishment is limited to $50 fine or thirty days imprisonment. The conviction in this case, though, was not for a simple assault, but for a very aggravated one. The defendant can gain nothing by this argument. If a simple assault was charged in the bill, the Superior Court had jurisdiction, for it may be that no "justice of the peace had proceeded to take official cognizance of the crime within twelve months after its commission," in which case the Superior Court could retain jurisdiction, as the burden is upon the defendant to show the fact that jurisdiction had been taken by a magistrate within said time, it being matter of defense. Pell's Revisal, sec. 1427 and cases in notes. So when the indictment charged an assault with a deadly weapon, describing the same, or with serious damage, with proper averments as to the extent of the damage, the Superior Court can punish, upon conviction of a simple assault, nothing more appearing; and it is only where there is a conviction of a simple assault, under an indictment which upon its face shows jurisdiction in the Superior Court, and the further allegation or finding that the twelve months since the commission of the offense had not elapsed, that the jurisdiction of the Superior Court is ousted. Pell's Revisal, *supra*. But we do not understand how the decisions upon those questions can help the defendant, as upon a bill charging an offense clearly within the jurisdiction of the court, he has been convicted of an aggravated assault. We have not laid any stress upon the provision as to offenses committed within one mile of the place where the court is held and during its session, as it was not of sufficient consequence to require more than passing notice.

In no view of the case was there any error committed by *Associate Justice Allen*, when he refused to discharge the prisoner, but remanded him, as set forth in his order.

No error.

STATE v. RICHARD NEVILLE.

(Filed 15 November, 1911.)

1. **Appeal and Error—"Recent Possession"—Instructions—Omission to Charge.**

When error on appeal is assigned upon the ground that the judge, on a trial for larceny, omitted to charge on the principles of law applicable to the defendant's recent possession, it is necessary for the court to examine the evidence of the State and the defendant, when the question turns upon the nature and legal significance of it; and if it tends either to acquit or convict without the necessity of any special consideration of the probative force of recent possession or of evidence by circumstances, the omission to charge thereon is not error, and a full and explicit instruction upon the doctrine of reasonable doubt is sufficient in the absence of a prayer for more specific instructions.

2. **Evidence—Recent Possession.**

Upon a prosecution of an indictment for stealing a mule, it was admitted that the mule had been stolen, but the defense was relied on that the defendant was not guilty of the offense; and there was evidence on behalf of the State tending to show that under the guise of trading horses the defendant solicited and had his nephew, younger than he and presumably under his influence, to meet him at a certain place, from which the defendant and his nephew drove in a buggy to a point about three miles distant from the home of the prosecuting witness, from which the defendant went alone and soon returned, bringing the stolen mule, and sent his nephew away with it into another State, suggesting a change of name in case of trouble, and giving him money and a pistol for the purpose of the journey; that eventually the nephew returned without the mule, stating that he had sold the animal on certain terms, and shared the proceeds of the sale with the defendant, returning the money and the pistol the defendant had loaned him: *Held,* an instruction that under this evidence the jury should consider the recent possession of the defendant after the theft as only a circumstance in passing upon defendant's guilt, was not error of which the defendant can complain. The presumption of defendant's guilt from recent possession after the theft discussed by WALKER, J.

3. **Evidence, Circumstantial—Corroborative—Burden of Proof.**

When the question of defendant's guilt or innocence of the charge of theft depends mainly on the credit the jury may give the testimony of a State's witness, considered in connection with other evidence in corroboration and of a circumstantial character, and is without complication, it is not required that the judge should charge the jury that each circumstance which formed a link in the chain should be established to their full satisfaction.

4. **Evidence—Collateral Matters—Harmless Error.**
Testimony of a witness who had been convicted of receiving property which defendant was being tried for stealing, as to the contents of a letter he had written the sheriff, without producing the letter, to the effect that he had not stolen the mule, did not tend to prove anything harmful to the defendant, and being collateral to the issue, its admission was not error.

5. **Evidence—Conversations—Impeachment of Witness.**
After the examination of a State's witness who had received property for stealing which the defendant was being tried, to the effect that he and the defendant had conspired together to that end, it is competent in corroboration for another State's witness to testify to a conversation with the first witness in regard to the arrangements he and the defendant had made for the purpose of the theft.

6. **Instructions — Evidence — Accomplice — Evidence, Weight of—Harmless Error.**
It was not prejudicial to defendant for the judge, in his instructions to the jury, to refer to a statement made by the solicitor that he would not ask a conviction for larceny of the defendant upon the unsupported testimony of his confederate, and, besides, a conviction could have been had upon the unsupported evidence of the accomplice, if the jury found that he had told the truth.

APPEAL from *Daniels, J.,* at March Term, 1911, of ALAMANCE.

The defendant was indicted in the court below for the larceny of a mule, the property of Walter Shepherd. The mule was last seen by its owner the fourth Sunday night in August, at about sundown, and it was not missed from the stable until the next day at about 4 o'clock A. M. He was found by Shepherd several weeks afterwards, near Martinsville, Va., with a saddle belonging to W. L. Spoon and a bridle belonging to the defendant, who lived with Spoon. After the mule was stolen, the defendant left home.

John Cole, a witness for the State, who had been convicted of receiving the mule from the defendant, knowing it to have been stolen, testified: That the defendant came to him when he was working for one Joe Cobb, and told him that he wanted him to assist in some horse trading. Cole at first said he could not go, but finally assented and it was agreed that he would meet the defendant on the following Sunday, which he failed to do, but they did meet afterwards at Burlington on the night the mule was stolen. They rode in a buggy to a bridge over the creek, which is two miles from the home of W. L. Spoon, the brother-in-law of the defendant and an uncle of Cole, and three miles from the house of the prosecutor, from whose stable the mule was taken. Cole being on unfriendly terms with Spoon, refused to go nearer the house than the bridge, and stopped there to wait for the defendant's return, the defendant having told him that he was going to get a mare and a colt, which he had in Spoon's barn. When the defendant returned, he had a mule, which was identified as the one taken from the stable of Shepherd that night. The defendant told Cole to take the mule and trade or sell it, and he could have all over $50 that he could get for it. The defendant, at the same time, gave him a pistol to carry with him for protection, and $2.50 in money, and suggested that it might not be a bad idea for him to change his name after he had left with the mule, in order that he might not have any trouble. Cole took the mule to Virginia and sold him, receiving $5 in cash and a note for $60. On his return, he told the defendant what had been done and gave him the pistol which had been borrowed, and $2.50 in money. A few days after Cole's return from Virginia the defendant went to see him and told him that a warrant had been issued for him for stealing the mule, and advised him to "hit the bushes." He asked Cole for the pistol, and it was given to him. There was evidence tending to show that the prosecutor traced the mule from his home to the bridge, by tracks which were made both by the mule and the man who had taken him, which tracks were made by the same number of shoes as those worn by the defendant. The defendant introduced evidence tending to contradict the witness for the State and to show that he was not at the bridge with Cole on the night the mule was stolen, nor at any other time, and each side introduced testimony in corroboration of its witnesses. It was admitted on the trial that the mule had been stolen from Shepherd, but the defendant denied that he was the thief, and offered evidence as to his good character.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

Parker & Parker and Long & Long for defendant.

WALKER, J., after stating the case: We will have to deal, in this case, largely with the question as to the nature of the evidence and its legal significance, and it is, therefore, necessary to examine the testimony introduced by the State and the defendant, in order to ascertain if, in any view of it, the defendant was entitled, without asking for them, to special instructions upon the law relating to recent possession and circumstantial evidence. We do not think the case called for specific instructions of the kind defendant now contends should have been given. The evidence, when properly viewed, tended either to acquit or convict the defendant, without the necessity of any special consideration of the probative force of recent possession or of evidence by circumstances. The proof on the part of the State, briefly stated, was that the defendant and Cole, his nephew, it must be understood, being younger than he was and naturally under his influence, had agreed, at the defendant's solicitation, to meet at a certain place for the purpose of trading horses, but really with the design of stealing the mule, as the gravely suspicious circumstances strongly indicate. They met in Burlington, according to agreement, or by accident, which makes no difference, and drove in a buggy to the bridge over the creek two miles from W. L. Spoon's and three miles from the prosecutor's home. There was evidently a conspiracy to steal the mule, and that would seem to have been the sole object of the journey, the swapping of horses being a mere sham or pretense, as the jury apparently found it to be. The defendant left John Cole, the State's witness, and went to W. L. Spoon's home, where he got a saddle and bridle. He then went to the stable of the prosecutor and got the mule and rode him to the meeting place at the bridge, where he told Cole that he had swapped the colt for the mule. He then sent Cole on his way to Virginia with the mule, for the purpose of selling or trading him, armed him with a pistol for protection and supplied him with money for the journey, and when he returned, after the sale of the mule, he received a part of the money and the pistol from Cole.

Upon this statement of the facts, we do not see how the defendant could have been benefited by a charge from the court as to the weight which they should give to the fact of recent possession. If Cole told the truth and the jury believed him, the possession of the mule by the defendant was about as recent as it was possible for it to be; but the judge, instead of instructing the jury that, owing to its nature, the law raised a presumption of guilt from such a possession, he told the jury that they should consider it as only a circumstance, in passing upon the defendant's guilt, for he nowhere charged the jury that there was any presumption, either of law or fact, as to the defendant's guilt. This charge was much more favorable to the defendant than it would have been if the court had told the jury, in accordance with the rule of law, that special weight should be given to the fact of recent possession. The charge is sustained by the case of *S. v. Hullen,* 133 N. C., 656, in which the Court said: "Recent possession of stolen property has always been considered as a circumstance tending to show the guilt of the possessor on his trial upon an indictment for larceny. It is not necessary that we should here draw any nice distinction concerning the presumptions of guilt based on recent possession as being strong, probable, or weak, because the court in its charge, to which there was no exception, instructed the jury that the recent possession of the defendant was only a circumstance to be weighed by them in passing upon his guilt, and this charge is sustained, we believe, by all the authorities. *S. v. Graves,* 72 N. C., 482; *S. v. Watts,* 82 N. C., 657; *S. v. Jennett,* 88 N. C., 665; *S. v. McRae,* 120 N. C., 608."

The rule in regard to recent possession of stolen goods was thus stated in *S. v. Graves,* 72 N. C., 482, by *Chief Justice Pearson:* "The rule is this: 'When goods are stolen, one found in possession so soon thereafter that he could *not have reasonably got the possession unless* he had stolen them himself, *the law presumes* he was the thief.' This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liberty to act on, notwithstanding the statute which forbids a judge from intimating an opinion as to the weight of the evidence." It is said in that case that this presumption of law is subject to some qualifications, depending upon the recency of the possession and the other facts and circumstances of the particular case. We need not decide whether the presumption of guilt was strong or weak in this case, as a matter of law, as the judge simply gave to it the force and effect of a bare circumstance against the defendant, to be considered by them in passing upon the question of his guilt or innocence. In *S. v. McRae*, 120 N. C., 608, it was held that the presumption of guilt arising from recent possession of stolen property is strong, slight, or weak, according to the particular facts surrounding any given case, and the cases are very rare in which the presumption of guilt can be held, as matter of law, to be strong, though the presumption in this case is stronger than usual, owing to the other facts and circumstances, as the possession of the defendant, when first discovered by Cole, was very recent after the theft had been committed, and the circumstances of the case surrounding it tended very strongly to convince a reasonable man that the defendant was the thief.

It is unnecessary, though, to consider this question any further, as the charge of the court was as favorable to the defendant as he had a right to expect; nor do we think it was necessary for the court to charge specially as to the rule in regard to circumstantial evidence. There was no chain of circumstances in this case which required the court to tell the jury that each circumstance which constituted a link in the chain should be established to their full satisfaction. A chain is no stronger than its weakest link, it is true; but there is no series of facts in this case necessary to be considered by the jury in order to convict the defendant. The case was without complication and depended mainly upon the credit which the jury should attach to the testimony of John Cole, the witness for the State, when considered in connection with the other evidence in the case. In *S. v. Adams,* 138 N. C., 688, we said: "No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed that unless after due consideration of all the evidence they are 'fully satisfied' or 'entirely convinced' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury, by which to 'gauge' the degrees of conviction has resulted in no good." These are the words used by *Chief Justice Pearson* in *S. v. Parker,* 61 N. C., 473, which we quoted and approved in the *Adams case,* as "they present in a clear and forceful manner the true principle of law upon the subject."

There are some questions of evidence in the case, which we will briefly consider. The witness John Cole was permitted to refer to the contents of a letter, written by him to the sheriff, without the letter being produced and offered in evidence. He stated that, in the letter, he said to the sheriff that he had not stolen the mule. This did not tend to prove anything prejudicial to the defendant, and, besides, it was collateral to the issue, and the contents of the letter could be shown without producing it. *S. v. Ferguson,* 107 N. C., 846; *S. v. Sharp,* 125 N. C., 631. What Joe Cobb, a witness for the State, testified as to his conversation with John Cole, in regard to the arrangements he had made with the defendant, was corroborative of Cole's evidence, and was, therefore, competent, Cole having been previously examined as a witness. *S. v. Freeman,* 100 N. C., 434; *S. v. Maultsby,* 130 N. C., 664. In *Freeman's case, supra,* it is said: "This is in consonance with adjudications in this State, which, whenever the witness is impeached and in whatever manner, even if it is done in the cross-examination, permits his credit to be sustained by proof of declarations made to others similar to the testimony given in and assailed, and these may be proved by the witness who made them."

It seems that the solicitor, in the course of the trial, had stated that he would not ask the jury to convict upon the sole and unsupported testimony of John Cole, who was an accomplice, and the judge repeated the remark of the solicitor in his charge to the jury, and the defendant entered exception thereto. We do not see how this was prejudicial to the defendant, even if it was error, for the jury could properly convict upon the unsupported testimony of John Cole, if they found that he had told the truth in regard to the matter, even though he was an accomplice of the defendant. The judge virtually told the jury, by referring to this remark of the solicitor, that they should not convict the defendant unless they believed that John Cole's story of what had occurred between him and the defendant, and as to what he saw at the bridge, had been supported by other evidence.

The other exceptions are without merit, and, besides, the rulings of the court were harmless, if erroneous. We have carefully reviewed the entire record, including the great volume of evidence sent up to this Court, by question and answer taken down by and recorded by a stenographer, and have failed to find any error committed by the court in the trial of the cause.

No error.

STATE v. J. THOMAS BROADWAY.

(Filed 27 November, 1911.)

1. **Legislative Acts—Ex Post Facto Laws—Definition.**
   An *ex post facto* law is one which either makes that a crime which was not a crime at the time the offense was committed or imposes a heavier sentence than that which was prescribed by the law at the time the offense was committed.

2. **Legislative Acts — Ex Post Facto Laws — Interpretation of Statutes.**
   Repeals by implication are not favored by the law, and an act which merely leaves it in the discretion of the trial judge to impose a longer sentence for an offense than that prescribed by a former act, without changing the constituent elements of the

crime, does not repeal the former act; and a subsequent sentence for the crime committed prior to the time of the enforcement of the second act, which does not exceed the limited time of punishment prescribed by the prior act, is valid.

3. **Incest—Evidence—Corroboration.**

Under an indictment for incest, proof of other acts of the same nature is competent in corroboration, and for like purpose of corroboration, evidence is also competent of cruel treatment tending to show compulsion and of pertinent statements made by the witness before the trial.

APPEAL by defendant from *Daniels, J.*, at November Term, 1911, of ROWAN.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

M. F. Hatcher and R. Lee Wright for the defendant.

CLARK, C. J. This is an indictment for incest, under Revisal, 3351, which provided that the punishment should be "by imprisonment in the State's Prison for a term not exceeding five years, in the discretion of the court." Laws 1911, ch. 16, amended that section "by striking out the words 'five years' in line five of said statute and inserting instead thereof the words 'fifteen years' between the words 'exceeding' and 'in,' " and provided that the amendment should be in force "from its ratification," 11 February, 1911.

The indictment was found at May Term, 1911, and the evidence showed the crime was committed prior to the act of 1911. The defense depends upon the question whether this is an *ex post facto* law.

An *ex post facto* law is one which either makes that a crime which was not a crime at the time the offense was committed or imposes a heavier sentence than that which was prescribed by law at the time the offense was committed. Here there was no change in the constituent elements of the crime. The change in the punishment took effect only, by the terms of the statute, "from its ratification," and hence did not apply to an offense which was committed prior to its enactment.

Repeals by implication are not favored by the law. In this case there is neither express repeal of any part of the statute nor any repeal by implication. The statute stands intact as it was, the Legislature simply adding ten years to the quantum of the punishment which the judge might impose. This additional ten years was to take effect in the future, and indeed under the constitutional provision forbidding *ex post facto* laws such additional punishment could not have applied to such crime unless committed after the act. The Legislature did not attempt to make it apply to crimes committed before that time, nor did the judge.

The subject is so fully and ably discussed by *Mr. Justice Walker* in *S. v. Perkins,* 141 N. C., 797, that we can add nothing thereto. He quotes from Potter's Dwarris on Statutes, 156, with approval, the following, which is conclusive of this case: "It is a general rule that subsequent statutes which add accumulated penalties and institute new methods of proceeding do not repeal former penalties and methods of procedure ordained by preceding statutes, without negative words." He also quotes with approval 26 A. and E. (2 Ed.), 726, as follows: "Every effort must be made to make all the acts stand, and the later act will not operate as a repeal of the earlier one if by any reasonable construction they can be reconciled. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and if any part of the earlier can stand as not superseded by the later one, it will not be repealed." In the present case the extension of the limit of the punishment which the judge could impose *in futuro* in no wise affected the elements which constitute the crime nor the punishment which would be imposed for its commission prior to the passage of the new act.

Bishop Stat. Crimes (1873), sec. 1865, is also quoted in *S. v. Perkins,* as follows: "Where a provision of the law is thus modified or cut short, it is not in any proper sense repealed. And we may lay down the doctrine broadly that no repeal takes place if the earlier provision can stand, to any extent consistently with the later." In *S. v. Putney,* 61 N. C., 543, which is also quoted in *S. v. Perkins, supra,* we have a case which is on all-fours with the present. In that case the offense of stealing a mule was punished by imprisonment, whipping, and fine, or either, at the discretion of the court. The act of 1867 made the stealing of a mule punishable with death, and the point was made, as here, that the defendant could not be punished under the former statute, because it was repealed by the new. But the Court held that the act of 1867 did not repeal the former law, but merely made the increase of punishment prospective, and that it should read as if written, "If any person shall hereafter steal a mule, etc., he shall suffer death," and held that all larcenies of that nature committed before the act should be tried and punished without reference thereto.

The defendant in this case relied upon *S. v. Massey,* 103 N. C., 360, but *Judge Walker* in *S. v. Perkins, supra,* well says: "*S. v. Massey* was decided upon the theory that the later statute by its very terms, and as if in so many words, had unqualifiedly and expressly repealed the earlier one." In *S. v. Massey,* 97 N. C., 465, it was held, "Where a statute only undertakes to amend one already on the statute-books, it may be presumed that it did not intend to repeal it, unless there is an express repealing clause."

The exception to proof of other acts of the same nature cannot be sustained. They are competent in corroboration, Underhill Crim. Ev., sec. 396; 22 Cyc., 53, as was also evidence of cruel treatment of the daughter offered to show compulsion, 22 Cyc., 53. The evidence of similar statements made by the witness before the trial was also competent as corroborative evidence, and this may be shown by the witness himself. *S. v. Freeman,* 100 N. C., 434; *S. v. Maultsby,* 130 N. C., 665.

No error.

STATE v. A. M. GOUGE.

(Filed 27 November, 1911.)

1. **Indictment—Mutilation of Records—Tax List—Register of Deeds.**
   An indictment charging that defendant "did unlawfully, willfully, and corruptly, and with fraudulent intent and purpose, take from the office of the register of deeds . . . the tax books" for a certain year, the books having been deposited in the register's office as ordered by law, and "did unlawfully, maliciously, willfully, and fraudulently obliterate, injure, and change the said tax book" for the certain year, "a record required to be kept by the register of deeds," is within the terms of Revisal, 3508.

2. **Same—Tax Book — Record — Indictment — Interpretation of Statutes.**
   The tax book of the register of deeds is a book of records required to be kept by the register of deeds, and it falls within the meaning of Revisal, 3508, making it an indictable offense under the conditions therein stated for their obliteration, etc.

3. **Same—Register of Deeds—Clerk to Board County Commissioners—Interchangeable Positions—Interpretation of Statutes.**
   The register of deeds is *ex officio* clerk to the board of county commissioners (Revisal, 2666), and the two positions are not separate offices, but used interchangeably in the statute (Revisal, 5238, 5239, 5240), and it is provided (Revisal, 5237) that the tax book to be made out by the register of deeds "shall remain in the office of" the clerk of the board of commissioners, and *Held*, a charge of an unlawful, etc., obliteration of the tax books required to be kept by the register of deeds meets with the requirements in that regard of Revisal, 3508.

4. **Register of Deeds—Copy of Abstract to Auditor—Requirements.**
   The register of deeds is not required to keep in his office a copy of the abstract from the tax book which the statute directs him to send to the State Auditor.

5. **Register of Deeds—Tax Books—Township Totals—Mutilation—Indictment—Interpretation of Statutes.**
   While the statute does not require the total tax for each township to be put in the tax book or record, of the computation of taxes for a county, it is a customary and convenient practice, and when such has been done, a mutilation or change of the totals on the record falls within the meaning of Revisal, 3508, and is an indictable offense when its provisions have been violated; besides, objections, in this respect, relate to matters of proof and not to the sufficiency of the indictment.

6. **Indictment—Tax Books—Register of Deeds—Mutilation—Township Totals—Auditor's Abstract—Parol Evidence.**

Upon a trial under an indictment of a deputy sheriff for changing the township totals of taxation for fraudulent purposes respecting a settlement thereof, testimony of a witness to the effect that the abstract which he made and sent to the Auditor was a correct copy from the tax list, and that the books now show a mutilation and change of the tax lists as to these township totals, amounting to a certain sum, which the defendant is charged with drawing from the bank of deposit for his own use, is competent, as the abstract sent the Auditor was made from unchanged items and could in no wise be affected by the alteration of the township totals.

7. **Same.**

An abstract made by a witness for the State Auditor from the tax list is but a written declaration of the witness which he at one time made as to the amount of the unaltered totals, and it is not necessary that this abstract be produced under an indictment for violation of Revisal, 3508, for the witness to state the township totals therein, for he may now testify what the total was, the parties being entitled to produce the abstract in corroboration or rebuttal, as the case may be, and in this case the addition of the unaltered items was introduced, from which the jury could ascertain whether the totals were correct or not.

8. **Indictment—Mutilation of Records—Tax Books—Defalcation of Sheriff—Evidence.**

Evidence that a deputy sheriff altered the township totals of taxation taken from the tax book and drew the difference in gold from the bank in order that his defalcation might not be traced to him, is simply that of a circumstance competent for what it is worth, as tending to show illegality and fraud, under indictment for violating the provisions of Revisal, 3508.

9. **Same—Character Witnesses—Cross-examination.**

A deputy sheriff was indicted for unlawfully mutilating the township totals of taxation (under Revisal, 3508) made out by the register of deeds and in his office, in order to conceal his defalcation: *Held*, competent on cross-examination of defendant's witness, for him to state that he had threatened the defendant with proceedings before a Superior Court judge before he would show his books or state the amount he had paid over, and it was not objectionable as an attack on the good character of the witness by proving specific acts of misconduct.

10. **Same.**

The cross-examination of a character witness is not restricted to the matter brought out on the direct examination, and in this case it was held competent for the State on cross-examination to bring out the fact as an incriminating circumstance, that the defendant, indicted under Revisal, 3508, twice refused to show his books to proper authority, or disclose the tax fund he had paid over, until threatened with legal proceedings.

BROWN, J., dissenting; ALLEN, J., concurring in dissenting opinion.

APPEAL from *Long, J.,* at April Term, 1911, of MITCHELL.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

W. L. Lambert, W. C. Newland, and S. J. Ervin for defendant.

CLARK, C. J. The defendant was convicted upon an indictment under Revisal, 3508, for fraudulently mutilating and changing tax books covering certain townships in Mitchell County. The indictment charged that the defendant "did unlawfully, willfully, and corruptly, and with a fraudulent intent and purpose, take from the office of the register of deeds of the said county the tax book for the year 1908, said tax book having been deposited in said office as ordered by law, and did unlawfully, maliciously, willfully, and fraudulently obliterate, injure, and change the said tax book for the year 1908, a record required to be kept by the register of deeds."

The indictment comes squarely within the terms of the statute, and the motion to quash was properly denied. The tax list is in a bound volume and is a "book of records required to be kept by the register of deeds." The register of deeds is *ex officio* clerk of the board of county commissioners. Revisal, 2666. The clerk of the board of commissioners is not a separate office, but a part of the office of register of deeds. The two offices are used interchangeably in the statute. In Revisal, 5238, the title says: "The register of deeds can make out tax duplicates." In the same section it is provided that one of the copies "shall remain in the office of the clerk of the board of commissioners," and further on in the same section it is said that an allowance shall be made to the "register of deeds." In Revisal, 5239, both the terms "register of deeds" and "clerk of the board of commissioners" are used. In Revisal, 5240, the same interchangeable use of these words occurs.

The defendant is indicted for altering and multilating the *tax list,* and not a copy of the abstract which was sent to the Auditor. The abstract sent to the Auditor is taken from the tax list, and a copy of such abstract is not required to be kept.

The defendant made the further objection that since the evidence shows that the township totals were changed, the indictment is not good, because the law does not require the total for each township to be put in the record. It is true, the statute does not say in so many words that the total of the tax of each township shall be set down by the register of deeds, but, being so set down, as is convenient and customary, to mutilate and change those totals is to mutilate and change the record, which the register of deeds has made in compiling the tax list for the county. Besides, this is a matter of proof and not a question of the sufficiency of the indictment.

The defendant further contends that it was error to permit the witness to state that the abstract which he made and sent to the Auditor was a correct copy from the tax list and that the books show now that there has been a mutilation and change of the tax list as to the totals which were recorded from certain townships, amounting in the aggregate to about $3,000.

The register of deeds, through his office force, prepared two copies of the tax list, one for his office and one for the office of the sheriff. In the register's own copy of the tax-list book the township totals appeared, and it was these that the defendant was charged with having altered. It was not contended that the general tax items on the tax list had been changed, only the township totals. The evidence of the witness amounted to nothing more than his saying that on a certain day, after the tax lists were made out, he added the general items of the county taxes and arrived at a certain sum, and thereafter when he compared that sum with the totals of the townships as they appeared on the tax list, the county total made about $3,000 more than the sum of the township totals as they appeared after the alteration therein. The abstract sent the Auditor having been made from the unchanged items, could be in no wise affected by the alteration in the township totals.

The defendant urges that the abstract sent to the Auditor's office should have been produced and that it was error to permit the witness to testify as to the sum total which was shown by such abstract. But there is no charge that the abstract was in any wise altered by the defendant. The abstract was simply a declaration made by the witness and was of no higher dignity, as concerns this trial, than his oral testimony as to what amount it showed. A certified copy of such abstract might have been used to corroborate the witness, or might have been used by the defendant to contradict him. But neither was required. The abstract was a written declaration of the witness which he at one time made as to the amount of the unaltered totals, but that did not prevent him from testifying now what the total was. The addition of the unaltered items on the tax-list book, which was before the jury, would show whether he is correct or not, without obtaining the abstract, which was a mere statement made out at some other time as to what the total of the general items of the tax list amounted to.

The other exceptions which were pressed were that the defendant while collecting taxes as deputy sheriff drew from the bank money from the sheriff's account which he took in gold, and refused to tell the amount of money which had been paid over to the school fund. The charge is that the township totals were mutilated by the defendant to show about $3,000 less than the true amount. It is contended that the motive was to settle by these reduced totals, which thus enabled the defendant to draw out the difference between the true amount collected and the amount shown by the addition of the altered township totals, and that the defendant drew this money in gold, so that it might not be traced. This was simply a circumstance which was competent to go to the jury for what it was worth and tending to show that the act was done "illegally and fraudulently," as charged.

A witness who had testified as to the good character of the defendant was permitted to state on cross-examination that he had threatened the defendant with Judge Councill before he would show his books or state the amount he had paid over. It is true that it is not competent on cross-examination to attack evidence as to good character by proving specific acts of misconduct. *S. v. Bullard,* 100 N. C., 486. But this the State did not attempt to do. The witness was put up by the defendant as a character witness, but the cross-examination is not restricted to that matter and it was competent for the State on the cross-examination to bring out the facts as an incriminating circumstance that the defendant twice refused to show his books to proper authority or to disclose the amount of the tax fund he had paid over to the board of education until the witness threatened to appeal to the Superior Court judge to force him to do so. The evidence was submitted to the jury for that purpose only.

No error.

BROWN, J., dissenting: I would not dissent in this case unless I thought a serious error had been committed. I believe in sustaining convictions of crime in the lower courts unless some *substantial* error has been committed. It may be that the error which I think has been committed in this case would not have changed the result, but I cannot give my approbation to the precedent the ruling of the Court will establish.

The abstract referred to in the opinion of the Court is as much a record as the tax lists. Such record was in existence and well known to the register of deeds and to the prosecutor. One was in the Auditor's office and one in the Corporation Commission.

The sum totals of that abstract was a potent fact in the proof. The register of deeds made them out. The correctness of his recollection of those totals was a most pertinent and important matter. The State had the right under the statute to offer copies of the originals, duly certified. Such copies are the best secondary evidence and far more reliable than the memory of the witness.

I think they should have been produced on the trial. *Kelly v. Craig,* 27 N. C., 129. In this case *Chief Justice Ruffin* says: "It is always a question of law whether the best evidence in the party's power has been produced, and inferior evidence is not admissible. If in this case the sheriff's copy of the tax list had been offered, it would have been competent, as there was sufficient proof of the destruction of the original. So, if it had appeared that the sheriff's copy had also been lost, then the parol evidence might have been given, since the paper of which the contents were proved was certainly lost, whether it was that in the clerk's office or in the sheriff's office."

See, also, the remarks of same great judge in *Kello v. Maget,* 18 N. C., 425; *Nelson v. Whitfield,* 82 N. C., 46; 25 Am. and Eng. Ency., 162-167.

MR. JUSTICE ALLEN concurs in this dissent.

STATE v. A. S. BLAKE.

(Filed 6 December, 1911.)

1. **Statute—Police Powers—Local Application—Constitutional Law.**
   Public-local acts, passed by the Legislature in the exercise of police power, which apply only to police regulation, are valid.

2. **Same—Game Laws—Quail—Closed Season—Bird Dogs at Large.**
   A statute enacted to protect the game birds of a certain county is a valid exercise of the police powers of the State, within the discretion of the Legislature, and hence there is no constitutional objection to an act which makes it "unlawful for any one to permit his or her setter or pointer dog to run at large during the closed season for quail," applying to a designated county alone.

3. **Constitutional Law—Government—Co-ordinate Branches—Powers—Legislature.**
   Under the State's Constitution the executive and judicial departments are grants of power, but the Legislature exercises all power which is not forbidden by the Constitution.

4. **Constitutional Law—Statutes—Game Laws—Closed Season—Dogs at Large—Cruel and Unusual Punishments.**

A statute which makes it unlawful for the owners of bird dogs to permit them to run at large during the closed season for quail in a certain county, making the offense punishable by fine or imprisonment, is not objectionable on the ground that our Constitution forbids "cruel and unusual punishment."

5. **Constitutional Law—Statutes—Punishment—Legislative Discretion—Judiciary—Excessive Punishment.**

Section 14, Article I of our State Constitution restricts the judiciary from imposing excessive punishments where the Legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them.

6. **Statutes—Alternate Punishments—Discretion of Courts—Leniency—Appeal and Error.**

When a statute makes certain acts an offense and punishable by "fine and imprisonment," the trial judge may impose either punishment or both; but if it were otherwise, a defendant has no ground for appeal that both sentences were not imposed on him.

APPEAL by defendant from *Long, J.*, at October Term, 1911, of HENDERSON.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

Bartlett & Shipp for defendant.

CLARK, C. J. Chapter 184, Public-Local Laws 1911, makes it "unlawful for any one to permit his or her setter or pointer dog to run at large during the closed season for quail" in Henderson County.

This statute was enacted to protect game birds and is a valid exercise of the police power of the State. *Lawton v. Steel,* 152 U. S., 153; *Greer v. Conn,* 161 U. S., 591; *S. v. Gallop,* 126 N. C., 979; *Daniels v. Homer,* 139 N. C., 222.

Public-local acts, passed in the exercise of the police power, which apply only to certain localities, are valid. Such legislation has always been held to be within the powers of the Legislature both as to criminal and civil matters: as to local liquor prohibition, *S. v. Barringer,* 110 N. C., 525; Fence laws, *S. v. Snow,* 117 N. C., 774; Restricting sale of seed cotton, *S. v. Moore,* 104 N. C., 714 (where the subject is fully discussed); Cattle running at large, *Broadfoot v. Fayetteville,* 121 N. C., 418; Method of electing municipal commissioners, *Harriss v. Wright,* 121 N. C., 172; Method of electing county commissioners, *Lyon v. Commissioners,* 120 N. C., 237; Public schools, *McCormac v. Commissioners,* 90 N. C., 441; Dispensaries, *Guy v. Commissioners,* 122 N. C., 471; Working public roads, *Tate v. Commissioners,* 122 N. C., 812; and other matters, *Intendant v. Sorrell,* 46 N. C., 49; Double damages for willfully cutting timber in certain counties, *Lumber Co. v. Hayes, ante,* 333, and many other cases cited, *S. v. Sharp,* 125 N. C., 633; *Brooks v. Tripp,* 135 N. C., 159.

In *S. v. Moore,* 104 N. C., 719, the Court, speaking of laws that apply only to particular localities or particular classes, quotes Cooley Constitutional Limitations (7 Ed.), 556, as follows: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply and that they are public in their character, and of their propriety and policy the Legislature must judge."

Judge Cooley further says, Cons. Lim. (7 Ed.), 555: "The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State, or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another."

As is concisely said in Black Const. Law, sec. 136: "The rightful power of the Legislature of a State extends to every subject of legislation, unless in the particular instance its exercise is forbidden expressly, or by necessary implication, by the Constitution of the United States and laws passed in pursuance thereof or by the Constitution of the State." It is further pointed out that under the Constitution of a State the executive and judicial departments are agents of power, whereas the Legislature exercises all power which is not forbidden.

The contention that this statute is obnoxious to the eighth amendment to the Federal Constitution, which forbids "cruel and unusual punishment," cannot be sustained, for it is well settled that the first ten amendments are restrictions upon the Federal Government only. *Pervear v. Com.,* 72 U. S., 475; *McDonald v. Com.,* 173 Mass., 322; *S. v. Patterson,* 134 N. C., 617, and cases there cited. In *Weems v. United States,* 217 U. S., 349, there is an interesting historical review of the origin and adoption of the eighth amendment.

Neither is this statute in violation of the similar provision in section 14, Art. I of our State Constitution. That section is a restriction upon the judiciary to impose excessive punishment where the Legislature has not prescribed a fixed maximum, but is not a restriction upon the legislative power. As *Mr. Justice Gaston* well says in *S. v. Manuel,* 20 N. C., 162: "When the Legislature, acting upon their oaths, declare the amount of bail to be required or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime as the reasonableness or excess, the justice or cruelty, of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a coördinate branch of the Government." When the punishment imposed is within the limit fixed by law it cannot be excessive. *S. v. Capps,* 134 N. C., 622.

The statute provides that a violation of its terms may be punished by "fine and imprisonment in the discretion of the court." We do not agree with the defendant that the sentence is illegal because the court imposed only a fine. When the punishment authorized is "by fine or imprisonment," only one can be imposed. *S. v. Walters,* 97 N. C., 489. But when, as here, the judge has authority to impose a sentence of "fine and imprisonment," he may impose either punishment or both. If it were otherwise, the defendant cannot appeal from a leniency which is in his favor, for he has suffered no wrong. At common law, the punishment for a misdemeanor was "fine or imprisonment," and the courts in their discretion imposed both or either.

No error.

STATE v. JAMES FRANCIS.

(Filed 13 December, 1911.)

1. **Judgment—Motion in Arrest—Conviction—Indictment.**
A motion in arrest of judgment will not be allowed after conviction, for the reason that a bill of indictment charging the unlawful manufacture and sale of spirituous, etc., liquors did not state the date of the commission of the alleged offense or the county in which it had been committed.

2. **Same—Defects in Bill.**
To sustain a motion in arrest of judgment after verdict for defects in the indictment, it must appear that the bill is so defective that a judgment cannot be pronounced upon a verdict thereunder.

3. **Same—Captions of Bill.**
An omission in the caption of a bill of indictment cannot be a ground for arresting a judgment under the indictment, for the caption is not a part of the bill in this sense.

4. **Judgment—Motion in Arrest—Conviction — Indictment—Allegations—Term of Court—Procedure.**
Omitting to state the term of the court in which a true bill is found is not a sufficient ground upon which to sustain a motion in arrest of judgment; especially so when from the record it appears at what term the bill was returned.

5. **Judgments—Motion in Arrest — Indictment—Allegations — Time of Offense.**
Time is not of the essence of the offense charged in a bill of indictment, and the failure of the bill to allege it is not a defect upon which the judgment will be arrested after verdict.

6. **Judgment—Motion in Arrest—Statutory Period—Instructions—Burden of Proof.**
When for conviction it is necessary to show the offense was committed within two years, the burden is upon the State to show it, which may be taken advantage of by the prisoner by a special request for instructions, and not by a motion in arrest of judgment after verdict.

APPEAL from *Long, J.*, at July Term, 1911, of McDOWELL.

Indictment for unlawfully manufacturing spirituous liquors.

There was a verdict of guilty. After verdict, defendants moved in arrest of judgment. The bill is as follows:

STATE OF NORTH CAROLINA—........County.
Superior Court, ...Term, 191..

The jurors for the State, upon their oaths, do present, That Jim Francis, Loge Francis, Ben Francis, late of the county of ...., on the...day of ....., with force and arms, at and in the county aforesaid, unlawfully and willfully manufacture and make spirituous liquors, against the form of the statute in such case made and provided and against the peace and dignity of the State. JOHNSON, *Solicitor.*

No. 70—State v. Jim Francis, Loge Francis, Ben Francis. Indictment, making liquor. Witnesses: Alexander Crawley,* J. A. Lughridge,* J. P. Ray.*

Those marked * sworn by the undersigned, foreman, and examined before the grand jury, and this bill found "A true bill."

C. C. BURGIN,
Foreman of the Grand Jury.

This bill was returned into open court at February Term, 1911, by C. C. Burgin, foreman of the grand jury.

THOMAS MORRIS, C. S. C.

The court overruled the motion and pronounced judgment. Defendants appealed.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for State.
D. F. Morrow for defendant.

BROWN, J. It is much the best that solicitors should fill in the blanks in the printed forms of indictment. It expedites the administration of the criminal law and prevents such appeals as this.

Had the defendant moved to quash this bill or for a bill of particulars to supply him with any needed information, it is probable the one motion or the other would have been allowed. The defendant has not been taken at any disadvantage, for he allowed the trial to proceed and attacked the bill only after he had been convicted. To arrest the judgment it must appear that the bill is so defective that judgment cannot be pronounced upon it.

The fact that the county in which the bill of indictment was found does not appear in the caption of the indictment does not constitute ground for arresting the judgment. *S. v. Warden,* 4 N. C., 596; *S. v. Brickell,* 8 N. C., 354; *S. v. Lane,* 26 N. C., 121; *S. v. Dula,* 61 N. C., 441; *S. v. Sprinkle,* 65 N. C., 463; *S. v. Williamson,* 81 N. C., 541; *S. v. Arnold,* 107 N. C., 864.

The caption is no part of the indictment, and its omission is no ground for arresting judgment. *S. v. Arnold,* 107 N. C., 864, and cases cited.

The term of the court being a part of the caption of the bill, the failure to insert it is no ground for arresting judgment.

Besides, the records of the Superior Court of McDowell County, embodied in the transcript of appeal sent to this Court, show that the bill was returned a true bill at February Term, 1911.

Time is not of the essence of the offense charged in the bill, and it was not necessary to allege the time at which the offense was committed. Revisal, 3255. *S. v. Caudle,* 63 N. C., 30; *S. v. Taylor,* 83 N. C., 601; *S. v. Peters,* 107 N. C., 876.

The burden of proof is on the State to show that the offense was committed within two years, and a failure to make such proof should be taken advantage of by the defendant by a request to instruct the jury. *S. v. Carter,* 113 N. C., 630; *S. v. Holder,* 133 N. C., 709.

The bill, while defective in form, is sufficient to sustain the judgment of the court.

Affirmed.

STATE v. CHARLES MURPHY.

(Filed 13 December, 1911.)

1. **Homicide—Murder in First Degree—Answer to Issues.**
   Our statute on the subject peremptorily requires that before sentence of death may be pronounced, the trial jury shall determine in their verdict that the prisoner is guilty of murder in the first degree (Revisal, sec. 3271), and our trial courts should always require that verdicts in capital cases definitely and expressly state the degree of murder of which the prisoner is convicted, and the verdict should be recorded as rendered.

2. **Homicide—Murder in First Degree—Defense—Drunkenness—Premeditation.**

While voluntary drunkenness may not be considered as a legal excuse for a crime, the principle is not allowed to prevail where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature of the crime charged.

3. **Same—Instructions—Appeal and Error.**

Our statute dividing the crime of murder into two degrees requires that for conviction in the first degree there must be deliberation and premeditation, or a purpose to kill previously formed after weighing the matter, and when the defense properly arises under the evidence, it is reversible error for the trial judge to refuse to instruct the jury, even in cases of voluntary drunkenness, that if the prisoner was so drunk that he could not form or entertain the essential ingredients of deliberation and premeditation, as stated, they should answer the issue as to murder in the first degree in the prisoner's favor.

4. **Homicide—Murder in Second Degree—Manslaughter—Defense—Drunkenness.**

The elements of deliberation and premeditation not being required as to murder in the second degree, or manslaughter, the defense of drunkenness is not an available plea thereto.

APPEAL from *Lane, J.*, at March Term, 1911, of YANCEY.

Indictment for murder. There was evidence tending to show that on 21 December, 1910, the prisoner, openly and in the presence of several witnesses, shot John Simmons, the deceased, in the back, with a pistol, and killed him, and that the killing was deliberate and premeditated.

There was evidence on the part of the prisoner tending to show that the killing was not deliberate, of premeditated purpose; second, that the mind of the prisoner was, at the time, so affected by disease that he was incapable of committing crime; third, that the mind of the prisoner was so affected, at the time, by voluntary drunkenness that he was incapable of committing murder in the first degree.

The court charged the jury as to the degrees of crime, embraced in the bill of indictment and on different phases of the evidence, elaborately as to nonresponsibility for crime in case of insanity, and in closing the charge said:

"Take the case; give it the consideration that its importance merits, and make up your verdict. If you find the defendant guilty of murder in the first degree, your verdict will be 'Guilty,' simply. If you find him guilty of murder in the second degree, your verdict will be 'Guilty of murder in the second degree.' If you find him guilty of manslaughter, your verdict will be 'Guilty of manslaughter.' If acquitted, you will say 'Not guilty,' and no more."

The jury rendered a verdict of "Guilty," and the same being so recorded, there was sentence of death, and the prisoner excepted and appealed, assigning for error (1) that the court failed and refused to charge, as requested, that if the mind of the prisoner, at the time of the killing, was so affected by drunkenness, though voluntary, as to be incapable of forming or entertaining a deliberate, premeditated purpose to take the life of the deceased, he could not be convicted of murder in the first degree. (2) That the verdict, as rendered, did not justify the court in pronouncing sentence of death.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

Gardner & Gardner and Justice & Broadhurst for defendant.

HOKE, J., after stating the case: Our statute, dividing the crime of murder into two degrees, concluded with the direction that the jury before whom an offender is tried "shall determine, in their verdict, whether the crime is murder in the first or second degree." This portion of the law now appears in Revisal, sec. 3271, and contains peremptory requirement that before sentence of death may be pronounced the trial jury shall determine, in their verdict, that the prisoner is guilty of murder in the first degree. We have held in several cases that although a verdict, as expressed, may not be sufficiently determinative, it may become so by reference to the pleadings or the charge of the court, or even to the evidence, when the same all appears of record.

An instance of the verdict cured by reference to the charge of trial judge is afforded in *Richardson v. Edwards*, 156 N. C., 590. Under this principle and owing to the very definite and precise instructions of the court as to the terms of the verdict, in case the jury should find the prisoner guilty of murder in the first degree, we might not feel constrained to disturb the judgment of the court, but we deem it proper to say that, having regard for the language of the statute and the supreme importance of the issue, our trial courts should always require that juries in capital cases should definitely and expressly say of what degree of murder they convict the prisoner, and the verdict should be recorded as rendered. In a case of this kind there should be no room for doubt or mistake.

Without definite ruling as to the form and sufficiency of the verdict when considered in reference to the charge of the lower court, we are of opinion that the prisoner is entitled to a new trial by reason of the failure to present the view, arising on the testimony and embodied in his prayers for instructions, as to the effect of "voluntary drunkenness."

It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide, as in *S. v. Wilson,* 104 N. C., 868; *S. v. Potts,* 100 N. C., 457. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: "Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence." Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the "killing was deliberate and premeditated," these terms contain, as an essential element of the crime of murder, "a purpose to kill previously formed after weighing the matter" (*S. v. Banks,* 143 N. C., 658; *S. v. Dowden,* 118 N. C., 1148), a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree nor as to manslaughter. Wharton on Homicide (3 Ed.), 810. It has been excluded in well-considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognized in *Arzman v. Indiana,* 123 Ind., 346, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as heretofore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to.

In illustration of the principles stated in *Reaper v. Vincent,* 95 Cal., 425, it was held, "That upon a prosecution for murder, an instruction to the jury that evidence of drunkenness can only be considered by them for the purpose of determining the degree of crime, and for such purpose it should be received with great caution, is correct." In *Commonwealth v. Cleary,* 148 Pa., 27, the following instructions were fully approved: "If, however, you find that the intoxication of the prisoner was so great as to render it impossible for him to form the willful, deliberate, and premeditated intent to take the life of the deceased, the law reduces the grade of the homicide from murder in the first degree to murder in the second degree. The mere intoxication of the prisoner will not excuse or palliate his offense, unless he was in such a state of intoxication as to be incapable of forming this deliberate and premeditated attempt. If he was, the grade of offense is reduced to murder in the second degree." In Wharton on Homicide (3 Ed.), p. 811, the author, referring to this subject, says generally: "Intoxication, though voluntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because, *per se,* it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime. And a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxication upon the question of the existence of premeditation, however, depends upon its degree, and its effect on the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law. And intoxication cannot serve as an excuse for the offender; and it should be received with great caution, even for the purpose of reducing the crime to a lower degree."

Applying the principle, the Court is of opinion that there was error committed in failing to present the view embodied in the prisoner's prayer for instructions, and he is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

STATE v. M. N. CORBIN.

(Filed 13 December, 1911.)

1. **Streams—Water Supply—Pollution—Indictment—Language of Statute.**

   The offense of unlawfully polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), is sufficiently charged in the indictment, when the language of the statute is followed therein. *S. v. Leeper*, 146 N. C., 655, cited and applied.

2. **Streams—Water Supply—Pollution—Conviction—Motion in Arrest—Bill of Particulars—Procedure.**

   Upon a charge and conviction for polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), a motion made in arrest of judgment upon the ground that it was not made to appear which stream the prisoner was charged with polluting, will not be sustained, the proper procedure being upon motion for a bill of particulars (Revisal, sec. 3244).

APPEAL from *Long, J.*, at October Term, 1911, of HENDERSON.

The defendant was convicted upon the following bill of indictment:

"The jurors for the State, upon their oaths, do present: That M. N. Corbin, late of the county of Henderson, on 10 July, in the year of our Lord one thousand nine hundred and eleven, with force and arms at and in the county aforesaid, unlawfully and willfully did defile, corrupt, or pollute a creek, the source of a public water supply used for drinking purposes in the vicinity of Tuxedo in said county, against the form of the statute in such case made and provided, and against the peace and dignity of the State. JOHNSTON, *Solicitor.*"

After conviction, he moved in arrest of judgment for that the indictment did not show what public water supply was polluted, and in what manner.

The motion was overruled, and the defendant excepted.

Judgment was pronounced upon the verdict, and the defendant excepted and appealed.

Attorney-General Bickett and George L. Jones, Assistant Attorney-General, for the State.

Staton & Rector for defendant.

ALLEN, J. The indictment follows the words of the statute, which is as follows: "If any person shall defile, corrupt, or pollute any well, spring, drain, branch, brook or creek, or other source of public water supply used for drinking purposes, in any manner, or deposit the body of any dead animal on the watershed of any such water supply, or allow the same to remain thereon, unless the same is buried with at least two feet cover, he shall be guilty of a misdemeanor, and fined and imprisoned, in the discretion of the court"; and it has been held repeatedly that it is sufficient for the indictment to follow the language of the statute. *S. v. Stanton,* 23 N. C., 430; *S. v. Roberson,* 136 N. C., 587; *S. v. Harrison,* 145 N. C., 408; *S. v. Leeper,* 146 N. C., 655.

If the defendant did not know which stream he was charged with polluting, or the means alleged to have been used, he could have obtained specific information by asking for a bill of particulars, under section 3244 of the Revisal.

Speaking of this question in *S. v. Shade,* 115 N. C., 757, *Mr. Justice Avery* says: "The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the Court unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment, otherwise objectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal."

The motion was properly overruled.

No error.

STATE v. WILL CORPENING.

(Filed 20 December, 1911.)

1. **Seduction—Letters—Written Admissions — Detached Portions—Severable Matters—Evidence.**

   In an action for seduction under promise of marriage, portions of letters written by defendant which contain severable and distinct declarations or admissions tending to establish his guilt are admissible in evidence, and afford the best evidence of their contents. Admissions of this character are not ordinarily considered to be within the best evidence rule.

2. **Written Admissions—Detached Portions—Severable Matters—Rebuttal—Practice.**

   When an admission appearing in a writing is put in evidence, the whole instrument, or so much of it as relates to the matter embraced in the admission, must be received, subject to the qualification that a party may always offer a distinct and severable portion of a writing containing declarations or admissions of his adversary, which tends to establish his position, leaving to that other the right to put such remaining portions in evidence as may serve to explain or qualify the admission.

3. **Attorney and Client—Jury—Argument—Law and Fact—Decisions—Application of Law—Improper Remarks—Appeal and Error.**

Under our statute, attorneys are allowed to argue the whole case to the jury, both as to the law and facts, and they are permitted to state the facts of a decision relied on only to the extent of applying the law of such case to the one being tried; hence, upon a trial for seduction under breach of promise of marriage, it is reversible error for the solicitor to be permitted to read the facts stated in an opinion of the Supreme Court relating to a trial for seduction and say, over objection of the defendant, that the jury had convicted the defendant in that case under weaker evidence than in the case at bar.

APPEAL from *Webb, J.,* at August Term, 1911, of MACON.

Indictment for seduction. There was verdict, "Guilty." Judgment, and defendant excepted and appealed, assigning for error the fact appearing of record, that with other letters, complete in form and tending to establish guilt, the court, over defendant's objection, admitted a portion of a letter containing relevant admissions of defendant, the remaining portions of the letter having been lost or destroyed. That the plaintiff's attorney, over defendant's objections, was allowed to make improper user of the facts of another case in his argument to the jury.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones and Robertson & Benbow for the State.

Johnston & Horn and J. Frank Ray for defendant.

HOKE, J. The portion of the letter admitted in evidence contained severable and distinct declarations or admissions tending to establish guilt on the part of the defendant, and in our opinion the same were properly received in evidence.

The portion of the letter which remained afforded the best evidence of the admissions contained in it, and, apart from this, admissions of this character are not ordinarily considered to be within the best evidence rule. McKelvey on Evidence, p. 94.

It is sometimes said that when an admission appears in a writing, the whole instrument, or so much of it as relates to the matter embraced in the admissions, must be read; but this must be taken with some qualifications, and a party may always offer a distinct and severable portion of a writing containing declarations or admissions of his adversary which tend to establish his position, leaving to that other the right to put such remaining portions in evidence which may serve to explain or qualify the admission. 1 Ency. of Evidence, p. 385, p. 609, and Note 50, p. 610; *Rowe v. Whited,* 25 N. Y., 170; *Cramer v. Gregg,* 40 Ill. Ap., 442; *Jones v. Fort,* 36 Ala., 449; 1 Elliott on Evidence, sec. 241, p. 349.

In this last citation it is said: "Every admission is to be taken as an entirety of the fact which makes for the one side, with the qualifications which limit, modify, or destroy its effect on the other side. Thus, as is already shown, where part of a statement or document is introduced as an admission by and against a party, or even part of a conversation or correspondence is so used, he is entitled to introduce such other part thereof, if any, as modifies or explains the alleged admission. Indeed, there is some authority to the effect that the party offering the evidence as an admission must put in the entire conversation or document; but the better rule is that, while he may do so, it is generally sufficient for him to introduce such part as he desires to use, at least where it appears complete in itself and nothing more appears to be necessary in order to understand it."

We think, however, there must be a new trial of this cause by reason of improper user of the facts in another prosecution for like offense which had taken place in an adjoining county the preceding year. *S. v. Malonee,* 154 N. C., 200.

As we understand the record, the counsel for the prosecution read the facts in *Malonee's case,* relied upon as supporting evidence to the prosecutrix, and over defendant's objection was allowed by the court to say in effect that a jury of Jackson County had convicted Malonee, and the supporting evidence was much stronger "than in *Malonee's case,*" etc., etc.

True, we have held that under our statute, attorneys are allowed to argue the whole case to the jury, both as to the law and the facts, and they are permitted to state the facts of the decision relied upon to the extent of applying the law of such case to the one being tried. *Harrington v. Wadesboro,* 153 N. C., 439. It is also true that on perusal of the entire statement the solicitor for the State, capable and conscientious as he is, was evidently using the facts of the *Malonee case* to sustain his position that there was evidence as required by the statute in support of the testimony of the prosecutrix, but we are of opinion, as stated, that in the faithful effort to discharge his duty he exceeded the rule which should prevail in such cases by using the facts in *Malonee's case* and the action of another jury upon them in aid of the prosecution here.

For the error in allowing the argument to proceed, the cause must be submitted to another jury, and it is so ordered.

New trial.

STATE v. SYLVESTER GOFFNEY.

(Filed 20 December, 1911.)

1. **Indictment—Housebreaking—"Felonious"—Motion in Arrest of Judgment.**

   An indictment under Revisal, sec. 3333, for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal, etc.," and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony"; and a motion in arrest of judgment on that ground should be denied.

2. **Housebreaking—Act Procured—Lawful Entry—Felonious Intent.**

   In order to convict of housebreaking under Revisal, sec. 3333, there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time.

APPEAL from *Cooke, J.,* at September Term, 1911, of WILSON.

Indictment for housebreaking under section 3333 of Revisal. There was a verdict of guilty. The court sentenced defendant to three years on the roads. Defendant appealed.

Attorney-General T. W. Bickett and Assistant Attorney-General G. L. Jones for the State.

Daniels & Swindell for defendant.

BROWN, J. 1. The defendant moved in arrest of judgment because the word felonious is not charged in the bill. The charge is that defendant did break and enter (otherwise than by burglarious breaking) the storeroom and house of George Barnes and Joe Barnes, partners, etc., with intent to commit a felony, to wit, with intent the goods, etc., of said Barnes Bros., etc., feloniously to steal, etc.

The defendant attacks the bill of indictment for the reason that it does not allege that the breaking and entering into the storeroom was feloniously done.

We think this exception is without merit. The indictment alleges that the defendant did break and enter with intent to commit a felony. We are unable to draw any distinction between the words unlawfully breaking and entering with the intent to commit a felony, and the words unlawfully and feloniously breaking and entering with the intent to commit a felony.

Using the word felonious as it is used in the indictment defines the offense as accurately as if it were repeated. In other words, if one breaks into a house with intent to commit a felony, he feloniously breaks into the house. The indictment follows the wording of the statute.

An indictment like the one at bar in this respect was held good in the case of *S. v. Tytus*, 98 N. C., 705; see, also, *S. v. Staton*, 133 N. C., 643.

2. It is contended by the learned counsel for defendant in a well-prepared brief that upon the State's evidence no crime has been committed, and with this position we fully agree.

There were only two witnesses examined. Barnes, the prosecutor and owner of the storehouse, testified: "I know the defendant, have known him for four years. He has been in my employ for several years, during which time I found him honest; he assisted me in my store and business a portion of the time. In consequence of statements made to me by Richard Farmer, a negro boy in my employ, I instructed Richard to induce defendant to break in my store. On the night of 7 July, Policeman Wynne, myself, and others watched the store, and about 12 o'clock we saw the defendant, Sylvester Goffney, and Richard Farmer go to the store, and saw defendant Goffney remove tacks holding a windowpane and remove the window and enter the store. Richard Farmer immediately afterwards also entered the store through the same window. Policeman Wynne, myself, and others who were watching the store, after firing pistols, entered the store and arrested the defendant Goffney, and required said Farmer to accompany us." The only other witness corroborated Barnes.

It is held in this State and elsewhere that larceny cannot be committed when the owner through his agent consents to the taking and asportation, though such consent is given for the purpose of apprehending the felon. *S. v. Adams,* 115 N. C., 775. In that case it is said: "Although the intent to steal certain property is formed and carried out, the perpetrator is not guilty of larceny if he has been persuaded by a servant of the owner, at the latter's instance, to commit the theft."

In the opinion *Mr. Justice Clark* well says: "The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the defendant may be punished."

In the case at bar it appears that Barnes, the owner of the building entered, *directed* his servant Richard Farmer to induce the defendant to break in his (Barnes') store; that the servant obeyed his orders, and that he and defendant entered the store together, and that Barnes was present watching them, and arrested defendant after he entered.

If it were possible to hold the defendant guilty of a felony under such circumstances, then Barnes could be likewise convicted of feloniously breaking and entering his own store, for he was present aiding and abetting the entry of the defendant and induced him to enter. That would of course be a legal absurdity.

Mr. Desty says: "Where the owner was apprised of the proposed burglary, and his servant, procuring the keys from his master, accompanied the burglar, and entered the premises, there could be no conviction." Desty's Am. Crim. Law, p. 486. See, also, Wharton's Crim. Law (9 Ed.), secs. 915, 766-770; *Reg. v. Johnson,* Car. and M., 218; *Allen v. State,* 40 Ala., 334 (1 Am. Dec., 476); *People v. Collins,* 53 Cal., 185; *Mace v. State,* 9 Tex. App., 110; *Speiden v. State,* 3 Tex. App., 156; 30 Am. Rep., 126; *Williams v. State,* 55 Ga., 391; 2 Russell (9 Ed.), 10; 3 Am. and Eng. Enc. Law, 662; 1 Bishop Crim. Law (4th Ed.), 570.

In *Love v. People*, reported in 32 L. R. A., 139, the building of one Hoag was entered by Robinson, Love, and others. Robinson was a hired detective, but posed among the others as one of them, and entered the building with the others. Robinson entered the building with the consent of Hoag. The Court held that Robinson having entered with the consent of the owner, committed no burglary, and that no burglary was committed, because of the absence of felonious intent. The defendants Love and others could not have been accomplices or privy to a burglary, because none was committed. *Love v. People,* 32 L. R. A., 139; many cases cited.

In *Reg. v. Johnson,* Car. and M., 218, where a servant, after having been approached to aid in robbing his master's house, pretended to consent, and then informed the police, who told him to proceed; he then went out and found the defendants and took them to the house of his master, letting them in through the door, it was held that they could not be convicted of burglary.

In the case of *Speiden v. State,* 3 Texas App., 30 Am. Rep., 136, the defendant was indicted for burglary by breaking into a bank with intent to commit larceny. The Court says: "In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They (the detectives) had the legal occupancy and control of the bank. Two of them made arrangements with the defendants to enter it, and defendant when arrested had entered the bank at the solicitation of these detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent."

It is said in Cyc., p. 181: "There is no burglary where the occupant of a house, or his servant or agent by his direction, or a public officer or detective with his consent . . . takes active steps to aid the suspect or to induce him to enter, although this may be done for the purpose of apprehending and prosecuting him, and although he may intend to commit a felony in the house." 6 Cyc., 181.

We recognize the principles laid down in *S. v. Smith,* 152 N. C., 798, but there is an obvious distinction between that case and this. In that case it is properly held that the fact that a party was deceived into a violation of the liquor laws of the State by a detective will not be a justification. In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one.

Upon the facts in evidence no crime was committed, because the entry was with the consent and at the instance of the owner of the property.

His Honor should have directed a verdict of not guilty.

Reversed and the proceeding

Dismissed.

STATE v. ROBERT GRAINGER AND MISSIE MARLOW.

(Filed 20 December, 1911.)

1. **Murder—Premeditation—Evidence.**

Upon a trial for murder, evidence that the prisoners, a man and a woman, were heavily drinking, that they fired a gun, having procured shells for the purpose, indiscriminately at houses along the road, to the fear of the occupants and those whom they met; that the male prisoner made threats against the life of the deceased, concurred in by the woman, who afterwards identified and pointed out the deceased, whereupon the male prisoner killed him with the gun he was carrying, is sufficient, upon the question of premeditation to sustain a verdict of murder in the first degree.

2. **Murder—Instructions—Collateral Matter—Prayers Refused—Substantial Compliance.**

Upon evidence tending to show that the prisoners, a man and woman, tried for murder, had been drinking heavily and were selling whiskey; that the male defendant assaulted a person with brass knucks, and afterwards unlawfully killed another person, the deceased, with a gun he was carrying, a charge of the court which clearly states for what offense the prisoners were tried, restricting the trial to that for murder, is a substantial compliance with a requested prayer for instruction, "that the prisoners were not on trial for selling whiskey nor for making an assault with the knucks as independent facts," and that the jury should not consider this evidence in arriving at their verdict.

3. **Murder—Deadly Weapon—Second Degree—Presumptions—Instructions.**

The killing of a human being with a deadly weapon raises the presumption of murder in the second degree, and a request for instruction which assumes a less offense, under conflicting evidence, should be refused.

4. **Murder—Motive—Burden of Proof.**

The burden is not upon the State to show the motive of one aiding and abetting the committing of murder by another, when the evidence is otherwise sufficient, though the case may be strengthened by showing motive when the evidence is circumstantial.

5. **Instructions—Contentions Stated by Judge—Appeal and Error.**

It is the duty of the court to state the contentions of the parties which are supported by the evidence, and his thus doing so is not error.

BROWN, J., dissents.

APPEAL from *Whedbee, J.*, at July Term, 1911, of COLUMBUS.

The facts are sufficiently stated in the opinion of the Court by *Mr. Chief Justice Clark.*

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.

Lewis, Lyon, and Greer and Irvin B. Tucker for defendant.

CLARK, C. J. The prisoners, Robert Grainger and Missie Marlow, were convicted of murder in the second degree. The evidence for the State showed that they were living together, without being married; that on the morning of 28 April, 1911, in company with one Tyson, they went to Cerro Gordo, where Grainger got an express package out of the depot containing whiskey. Grainger had a gun and before he got back into the buggy Missie Marlow said to him: "You had better get a box of shells; you will have need of them this evening." Grainger bought the shells, and they started to Grist's, 4 miles away. On the way, the parties took some fifteen or twenty drinks of the whiskey, to which they had added some water, and the witness said they were "neither drunk nor sober" when they got to Grist's. On the way, Grainger was constantly firing his gun and Missie Marlow reloading the gun every time he fired it. On the road Grainger and Missie Marlow talked about Bud Nobles, the deceased. Grainger said: "Ain't you got an old sport at Grist's?" She denied it, and Grainger said with an oath that she knew she had; that it was Bud Nobles, and that he "would 'tend to him this evening." He made the same threat to her three or four times, that he "would 'tend to Nobles" that evening.

When they got to Grist's, Grainger shot and scared some little children, who ran into a ditch about 200 yards from the postoffice. Then Grainger said: "Let's drink some whiskey." As the parties passed Smith's store, Bud Nobles was standing between the store and the old postoffice. Missie Marlow said to Grainger, "Yonder is the man you want," and Grainger said: "How do you know it is?" Missie said: "I know him by the suit of clothes, and I want you to shoot his d——d head off," and Grainger said: "I will do anything you say do." This was about half an hour before he shot Nobles. Grainger fired the gun twice at the house of Mr. Struthers. They then went on down the road about 300 yards and Grainger said, "Let's stop and take a drink," and they all did so. They then drove up to a negro house and shot a time or two, and, after some profanity and rowdiness, Grainger jumped out of the buggy with his gun in his hand and his knucks on the other and took after the darkey, whom he overtook and struck two or three times. Missie Marlow overtook him, and they went up the road together and saw Bud Nobles standing in the yard of Wiley Hammond. Grainger then opened his gun and said: "Bring me some shells." Missie Marlow said: "Run here, Robert; I have got the shells." They ran towards each other and Grainger got the shells from her. Nobles went on off up the street, when Grainger ran across and cut him off. Nobles' hands went up, palms out, and Grainger shot Nobles and the latter fell. He was unarmed. Grainger was four feet from Nobles when he shot him. Nobles died from the wound. There was other evidence of Grainger "shooting up" the town, Missie Marlow being with him.

The above was in substance the evidence for the State, somewhat condensed. The evidence offered by the defendant tended to show that there was a fight between the two men, and that the prisoner Grainger was cut with a knife. McCumbie, witness for the State, testified that he arrested Robert Grainger and Missie Marlow about 2 o'clock that night; that he saw his undershirt, and it was cut in several places; that there was a scar on his arm and two or three cuts in his back, but the cuts were not bleeding, and Grainger said that he had been cut in the arm the day before at Tyson's in trying to part some men in a row. He did not allude to the cuts on his back.

The first eleven exceptions are to the allowance of the evidence as to the prisoner "tanking up" on whiskey, his threats to Missie Marlow in regard to Nobles, and the conversation between them, and as to her identifying Nobles and telling Grainger to shoot his head off, and his saying that he would do so, and the evidence generally in regard to Grainger's "shooting up" the town. All this testimony was competent on the charge of murder in the first degree, to show premeditation. The jury were lenient in not taking that view of it, but in letting the parties off with a conviction of murder in the second degree.

It is true, the prisoner testified that there had been a fight between him and the deceased, and on the trial the prisoner was stripped in the presence of the jury and showed the cuts in his shirt and in his body. But the jury, in spite of the able defense of his counsel and the impassioned appeals to their sympathies, did not accept this version, but found that the prisoners were guilty of murder in the second degree. There is also further evidence for the State that the wounds on the prisoner's body were not fresh the night after the homicide. The jury rejected entirely the prisoner's allegation of self-defense.

The prisoner also relies upon an exception that the judge refused to give the following prayer for instruction: "The court instructs the jury that the prisoners are not on trial for selling whiskey nor for making an assault upon Henry Johnson with a pair of knucks, and as independent facts should not be considered by the jury in arriving at a verdict in this case." The prisoner Grainger contended that "at the time he fired the shots, three persons were assaulting him with knives; that he was not in the wrong; that he attempted to get them to stop; that they cut him in the back and knocked him down, and he fired." The court told the jury that if this was so, Grainger was not guilty of any offense, and it would be their duty to return a verdict of not guilty. The jury by their verdict utterly rejected the version of the affair contended for by the prisoners. Having rejected the prisoner's plea of self-defense, then under the law the jury would be compelled to return a verdict of murder in the second degree unless the defendant had offered evidence tending to reduce the crime to manslaughter, and there was nothing in the evidence referred to in the above special instructions which tended to reduce or increase the grade of the crime committed. *S. v. Quick*, 150 N. C., 820. The charge of the court clearly stated for what offense the prisoners were tried, and restricted the trial to that. This was a substantial compliance with the prayer.

The prisoners refrained from arguing in their brief the 18th exception, for refusal to give another prayer for instruction, though they do not expressly abandon it. That prayer could not have been given by the court, for it left out of consideration the presumption of murder in the second degree which arises from the killing with a deadly weapon.

Nor was it error to refuse the prayer for instruction that it was incumbent upon the State to show motive on the part of Missie Marlow for desiring that death or bodily injury be inflicted on the deceased, Bud Nobles. The law does not require that "If such motive existed, it is the duty of the State to show the same to the jury." While the case may be strengthened by showing motive, when the evidence is circumstantial, yet the State is never required to show such motive. *S. v. Adams,* 136 N. C., 620; *S. v. Turner,* 143 N. C., 642; *S. v. Stratford,* 149 N. C., 483.

Nor can we sustain exception 23, which is that the court recited the contentions of the State in summing up the contentions of both parties to the jury. In *Walker v. Walker,* 151 N. C., 167, *Mr. Justice Manning* said: "His Honor was in this particular stating the contentions of the defendant, and there was evidence offered on the trial supporting this contention. It has been frequently held by this Court that it is the duty of the trial judge to call to the attention of the jury those contentions of the parties which are supported by the evidence."

The prisoners were defended by able, eloquent, and zealous counsel. The case was tried by a very careful and able judge. The prisoners both testified in their own behalf. The jury after weighing carefully and impartially all the evidence on both sides have arrived at what may well be deemed a most merciful verdict. They might well have found upon this evidence the prisoners guilty of murder in the first degree.

In carefully considering the exceptions, we find no error committed which was prejudicial to the prisoners.

No error.

BROWN, J., dissenting: Since I have been a member of this Court I have never voted for a new trial in a criminal case unless I saw that some substantial and harmful error had been committed on the trial. I think that is the case here.

The court permitted the State to introduce evidence tending to prove that some time prior to defendant Grainger meeting with Nobles, the deceased, said defendant shot at Struthers' house; that he came back up Hammond Street and met up with some negroes, and hit one of them; that he threatened to shoot one Hinson; that he shot at some colored children; that he made an assault on Henry Johnson with his gun and struck him with knucks, and that he was attempting to sell whiskey.

All this evidence it appears to me to be utterly incompetent and well calculated to seriously prejudice the defendants before the jury.

The plea of the defendant Grainger is self-defense, and his main reliance was his own testimony, and bringing all these extraneous and incompetent matters into the case undoubtedly greatly injured him. *S. v. Jones,* 93 N. C., 611; *S. v. Barfield,* 29 N. C., 299-308; 21 Cyc., p. 896; *S. v. Whitaker,* 79 Ga., 87.

The prisoners asked the following instruction, which was refused, and they excepted: "The court instructs the jury that the prisoners are not on trial for selling whiskey, nor for making an assault upon Henry Johnson with a pair of brass knucks, and, as independent facts, should not be considered by the jury in arriving at a verdict in this case."

The Attorney-General, with his usual candor, says in his brief that in his opinion the court should have given that prayer, and admits that the evidence referred to in the instruction was not competent.

It is urged, however, that, inasmuch as the jury rejected the defendant's plea of self-defense, the error was harmless, as defendant would be guilty of murder in second degree, the crime for which they stand convicted. It may be that the admission of all that incompetent evidence so prejudiced their minds that the jury rejected his plea and evidence entirely.

This was a proper and pertinent instruction, and had it been given it would have neutralized the effect of the incompetent evidence.

STATE v. J. E. DOSTER.

(Filed 20 December, 1911.)

1. **Recorder's Courts—Jurisdiction Exclusive—Legislative Powers—Corporate Limits—Constitutional Law.**

   Section 27, Article IV of the State Constitution, as modified by section 14 of the same article, authorizes and empowers the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits.

2. **Same.**

   An act creating a recorder's court for an incorporated town, conferring exclusive jurisdiction over offenses cognizable in courts of a justice of the peace, is void in so far as it seeks to extend the jurisdiction and make the same exclusive as to such offenses committed in the township beyond the corporate limits of the town.

APPEAL from *Cooke, J.*, at Fall Term, 1911, of UNION.

Criminal action heard on appeal from justice's court.

On the trial it appeared that defendant on 29 October, 1911, the said date being Sunday, was found off his premises and having a shotgun, etc., within Monroe Township and outside of the city of Monroe, contrary to Revisal, sec. 3842. That on warrant issued by M. L. Flow, a justice of the peace of Monroe Township, resident within the city of Monroe, defendant was convicted for said offense, and on appeal to the Superior Court was again convicted and sentenced. Defendant having raised question by motion to quash the indictment, etc., moved in arrest of judgment that under the statute establishing the recorder's court for the city of Monroe, a justice of the peace had no jurisdiction to try the offense. Motion denied, and defendant excepted and appealed.

Attorney-General T. W. Bickett and George L. Jones, Assistant Attorney-General, for the State.

J. J. Parker for defendant.

HOKE, J. The act establishing the recorder's court for the city of Monroe, Laws 1907, ch. 860, in section 4, subsec. 3, confers upon said court exclusive original jurisdiction of all criminal offenses within Monroe Township in said county of Union "which are now or may hereafter be within the jurisdiction of a justice of the peace." Section 3842 creates an offense which is within the ordinary jurisdiction of the justice of the peace, and if the act in question is valid the position of defendant must be sustained. The Constitution, Article IV, sec. 27, among other things provides that "The several justices of the peace shall have jurisdiction of all criminal matters arising within their counties where the punishment cannot exceed a fine of $50 or imprisonment for thirty days."

In *S. v. Baskerville* the Court held that this provision as to jurisdiction, otherwise peremptory, was so far modified by section 14 of the same article, that authorizing the General Assembly to establish special courts for the trial of misdemeanors in cities and towns, that such courts could be given exclusive jurisdiction of all proper offenses committed within the incorporate limits of the city or town where the same were properly established.

In *Baskerville's case* the offense was committed within the incorporate limits and the exclusive jurisdiction given by statute to the recorder's court was to that extent upheld. The principles of construction approved in *Baskerville's case* and the conclusion reached are set forth in the opinion as follows: "It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers. *Sutton v. Phillips,* 116 N. C., 502; *S. v. Lytle, supra.*" It is also an accepted canon of construction that in case of ambiguity the whole Constitution is to be examined in order to determine the meaning of any part, and the construction is to be such as to give effect to the entire instrument and not to raise any conflict between its parts which can be avoided. Black on Interpretation of Laws, p. 17, clause 10, citing Cooley Const. Lim., p. 58, and *Manly v. State,* 7 Md., 135. And the same idea is expressed by our Court in *S. v. Pender, supra,* where the judge says: It is the duty of the courts of this State, and one which the Court has endeavored faithfully and impartially to perform, to give to the Constitution such an interpretation as will harmonize all of the parts, and without violating any leading idea in it as a whole. From the principles here stated and the decisions of our courts, from the language of the Constitution itself, and considering the two sections together and giving to each its proper effect, we think it a correct deduction and hold it to be the law that: (*a*) Section 27, Article IV, conferring jurisdiction on justices of the peace, is so modified by section 14 of the same article as to authorize and empower the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits of the same. Applying the principles approved in *Baskerville's case* to the facts presented here, we think it follows as a necessary conclusion that when, as in this case, the offense is committed outside of the corporate limits of the city, the general provision of the Constitution conferring criminal jurisdiction on justices of the peace must prevail. And the act establishing the recorder's court in so far as it attempts to confer exclusive jurisdiction on such offenses occurring outside the city limits must be declared invalid.

There is no error, and the judgment of his Honor must be affirmed.

Affirmed.

STATE AND THE CITY OF ASHEVILLE v. STAPLES.

(Filed 20 December, 1911.)

1. **Cities and Towns—Police Powers—Billboards—Discretion—Courts.**

The courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Small v. Edenton,* 146 N. C., 527, overruling *S. v. Higgs,* 126 N. C., 1014, cited and approved.

2. **Same—Ordinances—Conflagrations—Health.**

It is within the police powers of a municipality and a valid exercise of its discretionary power, to pass an ordinance, as a preventive against fires and in furtherance of the health of the town, requiring that "billboards or other similar structures used solely for the purpose of displaying posters or other public advertisements" shall not be nearer the ground than 24 inches, except where they are erected and maintained against a wall, and imposing a fine as a punishment for its violation. *S. v. Whitlock,* 149 N. C., 542, cited and distinguished.

APPEAL from *Lane, J.,* at August Term, 1911, of BUNCOMBE.

Criminal action tried on appeal from police court of the city of Asheville. It appeared that defendant was arrested, tried, and convicted on a warrant issued by the police judge of said city, and the testimony showed a violation by defendant of an ordinance of the city in terms as follows:

"SEC. 773. That no person, firm, or corporation shall erect or maintain within the city of Asheville any billboard or other similar structure used solely for the purpose of displaying posters or other public advertisements, the boards of which shall be nearer the ground than 24 inches, except where said billboards are erected and maintained against the wall of a building or other solid wall, and any person violating any of the provisions of this section shall, upon conviction, be subject to a penalty of $25 for each and every such offense."

In the Superior Court, on motion, there was judgment questioning the warrant which was based on and recited the ordinance, and the State excepted and appealed.

Attorney-General T. W. Bickett and G. L. Jones, Assistant Attorney-General, and J. F. Glenn for the State.

Craig, Martin & Thomason for defendant.

HOKE, J., after stating the case: It is well recognized in this State that "courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion." *Rosenthal v. Goldsboro,* 149 N. C., 128; *Tate v. Greensboro,* 114 N. C., 392.

There was some limitation placed on the principle in the case of *S. v. Higgs,* 126 N. C., 1014, but that case was expressly overruled in *Small v. Edenton,* 146 N. C., 527, and the opinion of the present *Chief Justice,* in *Small's case,* is in full approval of the position as it had formerly prevailed. The charter of the city of Asheville confers ample power to pass an ordinance of the general character in question. *S. v. Whitlock,* 149 N. C., 542.

And in the learned and well-considered brief of the counsel for the city it is suggested, in support of the ordinance in question here, that the same is reasonable and "necessary to protect the public generally from the unsafe condition caused by the accumulation of leaves, papers, and other waste material which accumulate against billboards when constructed against the ground. It is a necessary restriction to protect adjoining and other buildings contiguous thereto from the danger of fire, which could so easily be conducted from such condition. It is also necessary for the purpose of keeping vacant property in a sanitary condition."

On authority here and elsewhere, these considerations should, in our opinion, be allowed to prevail and the ordinance upheld as a valid exercise of the powers conferred. *Rosenthal v. Goldsboro, supra; S. v. Whitlock, supra; Small v. Edenton, supra; City of Chicago v. Gunning System,* 214 Ill., 628; *City of Rochester v. West,* 164 N. Y., 510; *City of Passaic v. Bill Posting Co.,* 71 N. J. L., 75; *In re Welshire,* 103 Fed., 620.

In our present decision we do not intend to qualify or question in any way the disposition made of *Whitlock's appeal, supra.* In that case it appeared that the ordinance prohibited the erection of billboards on private property, regardless of whether the same were secure or insecure. It seemed to have been based on esthetic considerations alone, having no reference whatever to the protection and security of the public, and on that account it was held to be an unwarranted and unreasonable interference with the rights of the individual owner.

In his forcible and learned opinion in *Whitlock's case, Associate Justice Brown* states the doctrine applicable and the reasons upon which it rests as follows: "Esthetic considerations will not warrant its adoption, but those only which have for their object the safety and welfare of the community. It is conceded to be a fundamental principle under our system of government that the State may require the individual to so manage and use his property that the public health and safety are best conserved. It is to restrict the owner in those uses of his property which he may have as a matter of natural right, and make them conform to the safety and welfare of established society, that the police power of the State is invoked." . . . "While this is true, yet it is fundamental law that the owner of land has the right to erect such structures upon it as he may see fit, and put his property to any use which may suit his pleasure, provided that in so doing he does not imperil or threaten harm to others. Tiedeman Lim., 439. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public; but a limitation which is unnecessary and unreasonable cannot be enforced. Although the police power is a broad one, it is not without its limitations, and a secure structure upon private property, and one which is not *per se* an infringement upon the public safety, and is not a nuisance, cannot be made one by legislative fiat and then prohibited." Citing *S. v. Milwaukee,* 10 Wall, 497; 1 Dillon on Municipal Corporations, 374.

There is error, and this will be certified that the cause be further proceeded with.

Reversed.

STATE v. J. J. ARLINGTON.

(Filed 20 December, 1911.)

1. **Insurance—Interpretation of Statutes.**

   Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, real or pretended, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with.

2. **Insurance—Foreign Corporations — Local Branches — Sick and Death Benefits—License to Agents—Insurance Commissioner—Interpretation of Statutes.**

   A corporation organized with a home office in another State, with executory supervision and control of branch organizations, in some respects local in their character, with provision in the by-laws that the local branch may pay sick and death benefits to their members, the local organizations paying certain fees to the home office for new and old members, comes within the intent and meaning of our insurance laws, requiring that all insurance companies must be licensed and supervised by the Insurance Commissioner (Revisal, sec. 4691); that every agent must pay a license tax, etc. (Revisal, sec. 4706); that a general or district agent or organizer or local or canvassing agent must pay a certain tax as to each, section 4715 (3).

3. **Insurance Companies—Foreign Corporations—Fraternal Orders—Interpretation of Statutes.**

   Fraternal insurance orders are such as make provision for sick and death benefits (Revisal, 4794, *et seq.*), and they are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not required to make the deposit or have the paid-up capital required of other companies.

4. **Insurance—Foreign Corporations—Fraternal Orders—Definition—Interpretation of Statutes.**

One who without license from the Insurance Commissioner, advertises and represents that a certain order operating from another State "was there"; that he was the representative; that the order paid accident and death benefits; that he solicited people to "come at once and join"; that he gave a membership receipt to those who applied and paid the membership price, is an insurance agent within the purview of the statute, and indictable thereunder for soliciting insurance in a company not complying with our laws and for not having been licensed by the Insurance Commissioner to solicit business.

5. **Insurance—Agents Licensed—Indictment—Interpretation of Statutes.**

The language of our statute relative to making it unlawful for one to solicit business for a foreign insurance company is, "If any person shall assume to act as an insurance agent without a license therefor, as required by law," and a bill of indictment for the offense will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise it is sufficient.

6. **Insurance—Foreign Corporations—Control of Home Office—License—Option to Insure—Local Branches.**

When it appears that a foreign fraternal order is doing business in this State by organizing local branches, a conviction can be had if, under its constitution, its local branches, having the insurance features of death and sick benefits, have been organized in all portions of the country, doing business under by-laws furnished by the home office, and in its scheme of government the authority of the home office is so absolute and all-pervading that it must be judged and have its status fixed by what it sanctions and approves; and this position may not be properly altered or affected because some particular local branch does or does not adopt the insurance feature.

7. **Insurance — Unincorporated Companies — Interpretation of Statutes.**

Our statutes relating to the regulation and supervision of insurance companies by the Insurance Commissioner uses the words insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies.

APPEAL from *Biggs, J.*, at April Criminal Term, 1911, of MECKLENBURG.

Indictment for violation of the insurance laws. The bill of indictment was as follows:

"The jurors for the State, upon their oaths present, that J. J. Arlington, late of Mecklenburg County, on the 29th day of March, 1911, with force and arms at and in the said county, unlawfully and willfully did assume to act as an insurance agent for the 'Order of Owls'; the said J. J. Arlington representing the said 'Order of Owls' to be a fraternal insurance order or company, having a sick and accident benefit of $6 per week and a death benefit of $100; and the said J. J. Arlington assuming to so act as an insurance agent by soliciting B. S. Davis, B. C. Goldberg, and others to the jurors unknown, to become members of the said 'Order of Owls' by keeping open an office and place of business in Charlotte, N. C.; by advertising in the *Charlotte Daily Observer* and other papers to the jurors unknown; by using printed cards and other methods of advertisement; by receiving from B. S. Davis and other persons to the jurors unknown the sum of $5 each as initiation fee in the said 'Order of Owls,' the said 'Order of Owls' not being an insurance company lawfully licensed and authorized to do business in North Carolina, and the said J. J. Arlington having no license to act as an insurance agent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. And the jurors for the State, upon their oaths, do further present that at and in said county, on the day and year aforesaid, the said J. J. Arlington did engage in the negotiation of unlawful insurance for and with the 'Order of Owls,' a foreign fraternal insurance order or insurance company, not admitted nor licensed to do business in the State of North Carolina, by soliciting B. S. Davis, B. C. Goldberg, and other persons to the jurors unknown, to become members of the said 'Order of Owls'; by soliciting from the said B. C. Goldberg, B. S. Davis, and others to the jurors unknown, the payment of initiation fees, and by the receipt of the said initiation fee from B. S. Davis and other persons to the jurors unknown, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

There was verdict of "Guilty." Judgment, and defendant excepted and appealed.

Attorney-General T. W. Bickett and Assistant Attorney-General George L. Jones for the State.
Tillett & Guthrie for defendant.

HOKE, J. The statute law of North Carolina, more especially chapter 100, vol. II of the Revisal, makes elaborate and minute provision for the protection of its people from imposition under the guise of insurance, real or pretended, and a department is created, charged with the especial duty of seeing that these rules are complied with.

Under section 4691 and others bearing on the question, all insurance companies must be "licensed and supervised" by the Insurance Commissioner, and, under section 4706, every agent must be licensed. By section 4715 (3) every general agent is required to pay a license tax of $5 per annum, district agent or organizer a like tax of $3, and a local or canvassing agent a tax of $1. These and other special regulations apply to foreign companies doing business in the State, and such companies are also required to make deposit for the protection of their policyholders, etc.

Under sections 4794-4798, inclusive, fraternal orders are defined and regulated, orders which make provision for sick and death benefits by assessment, and by section 4798 these orders are subject to the same rules, regulations, and supervision as foreign insurance companies, except that they are not required to make the deposit or have the paid-up capital, as in other companies. Having established these extended regulations, a violation of the same on the part of the companies is made a misdemeanor under the following comprehensive statute, Revisal, ch. XIX, sec. 3484, vol. II:

"If any person shall assume to act as an insurance agent or insurance broker, without license therefor, as required by law, or shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this State, or as principal or agent shall violate any provision of the law in regard to the negotiation or effecting of contracts of insurance, he shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $100 nor more than $500 for each offense." Indicted under this section in form as above stated, it was made to appear on the trial that the Order of Owls is an association which seems to have had its origin in South Bend, Ind., consisting of the home nest, with power of self-perpetuation and operating under a plan by which branch nests may be and have been organized in large numbers in various sections of the country, under a form of by-laws suggested by the home nest. These by-laws contain provision for sick and death benefits, but the rules or constitution established for the home nest do not profess to control the branch nest in this feature of benefits except in section 30, which is to the effect that each subordinate nest may pay death benefits to the executor, mother, wife, or child of a member who dies in good standing, to an amount not exceeding $100. As showing the general nature of this organization and the control and supervision vested in the home nest towards the subordinate nests, the following provisions appear in the constitution:

"1. This organization shall be named 'Order of Owls.' Its object, the advancement of its members, socially, morally, intellectually, and otherwise.

"2. This society shall consist of an organizer's branch and subordinate branches. The organizer's branch shall be known as 'Home Nest,' and the subordinate branches shall be respectively known as 'Nest No. ......'

"3. The home nest shall consist of the organizers thereof or their successors elected by unanimous vote of the survivors to fill any vacancy caused by the death or resignation or removal of any member. No member of the home nest shall be expelled except on the unanimous vote of all other members thereof.

"4. Branch nests shall consist of not less than ten persons, and no male shall be a member of a branch having female members, or *vice versa.*

. . . .

"8. Each nest shall pay the 'Home Nest,' for the support of the general organization, the sum of 10 cents per member quarterly at the end of each quarter for each member of the branch who was in good standing at any time during such quarter.

. . . .

"14. The supreme president may at any time revoke the charter of any nest or suspend for any length of time the existence of such nest; and in case of his doing so, all the property and funds of the nest shall become the property of the home nest and be paid to it.

. . . .

"17. The sum of $2 shall be remitted the home nest for each candidate initiated and $1 additional for each charter member.

"18. The sole executive power of this organization shall be vested in the home nest, and in the supreme president when the home nest is not in session, including the right to grant dispensations of any and all kinds.

. . . .

"28. The supreme president shall designate the first place of holding all conventions. The home nest shall be at South Bend, Ind., unless its members see fit to change it. Except as herein otherwise provided, the executive, legislative, and all other powers of the home nest shall be vested in a trinity, consisting of the supreme president, secretary, and treasurer."

There was further testimony to the effect that the defendant, not having any license from the Insurance Commissioner, "advertised and represented (*a*) that the Order of Owls was there; (*b*) that he was their representative; (*c*) that the Order of Owls paid accident and death benefits; (*d*) he solicited people to come at once and join; (*e*) he gave a membership receipt to those who applied and paid the required $5."

In view of this evidence, we concur in the ruling of the trial judge, that if the relevant facts were accepted by the jury, the defendant was guilty as charged in the bill of indictment.

"He unlawfully assumed to act as insurance agent for the 'Order of Owls,' represented by him to be a fraternal insurance order. He unlawfully engaged in negotiating for insurance in the 'Order of Owls,' a foreign fraternal insurance order, not admitted or licensed to do business in this State."

It is urged that the first count of the bill is fatally defective and no conviction can be had thereon, for that it contains no direct averment that the "Order of Owls" is a company subject to the insurance regulations; but in our opinion no such averment is required for a proper indictment, and no such fact is essential to constitute the crime.

The entire, certainly the chief, purpose of this legislation is to protect people from harmful imposition in contracts and dealings of this character, and the evil which the statute is designed to prevent is as threatening in the case of a bogus as a real company, perhaps more so.

The language of the act relevant to the charge contained in the first count, "If any person shall assume to act as an insurance agent without a license therefor as required by law." The facts in evidence show that the defendant, in his published advertisement and his cards circulated in the vicinity, in taking money and issuing receipts, assumed to be the agent of a company paying sick and death benefits. His conduct comes within the permissible and proper meaning of the words used in the statute and clearly within the mischief contemplated, and the first count in the bill of indictment must be held sufficient. *S. v. Leeper,* 146 N. C., 655; *S. v. Harrison,* 145 N. C., 417.

It was further contended that no conviction should be allowed on either count because it did not appear that any local nest was organized in the locality as stated, and, if otherwise, that the insurance feature was optional with the local nest. But on the facts in evidence neither position can be maintained. It appears that under the constitution these local nests, having the insurance features of death and sick benefits, have been organized in all portions of the country, doing business under by-laws furnished by the home nest, and in its scheme of government the authority of the home nest is so absolute and all-pervading that it must be judged and have its complexion and status fixed by what it sanctions and approves, and this condition may not be properly altered or affected because some particular nest does or does not adopt this insurance feature. According to defendant's cards, by which persons were induced to apply for membership and pay their money, these are the relevant facts:

Reasons Why You Should Join the Order of Owls:

1. Order of Owls has sick and accident benefit of $6 per week.
2. Order of Owls has $100 death benefit.
3. Order of Owls furnishes free physician for you and your family.
4. Order of Owls will help you to get a position when you are out of employment.
5. Order of Owls will help you in your business. They trade with each other.
6. Order of Owls furnishes you social advantages.
7. The dues are 50 cents per month; no extra assessment.
8. After closing the charter, the initiation fee in this city will be $25.
9. You will get in on the election of officers, if you join now, and are one of the leaders.
10. You do not have to take the initiation if you join now, and the total cost is only $5.

Be a Leader! *Join Now!*
Hoo! *Hoo!*
The Order of Owls is Here!

The Order of Owls is more than six years old and has about 1,400 nests with a membership of nearly 200,000 in the United States, Canada, Alaska, Cuba, Mexico, Porto Rico, Philippines, Sandwich Islands, New Zealand, Australia, and South Africa. The Order of Owls is made up of the

Jolliest and Best Fellows on Earth.

The company, therefore, which defendant assumed to represent was a fraternal order, coming within sections 4795-4798 of Revisal, and, in soliciting contracts and receiving money for it, when neither he nor his company had been properly licensed, defendant was guilty under the second count in the bill. The authorities relied upon by defendants, as far as examined, do not affect our conclusion. In some of them the bill was questioned because no overt act was charged, as in *Fiske v. State,* 87 Miss., 251. In others, as in *S. v. Campbell,* 46 N. C., 944, the statute, by correct interpretation, was held to apply only to incorporated companies. In the case at bar the overt acts are fully set forth and the law is not so restricted. Throughout the statute, in sections relevant to the inquiry, the words used are insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. This business of insurance and insurance companies has become of such great interest and importance that our statutes, as stated, have made extended regulations for its supervision and control. The department established for the especial purpose, under the direction of its active and capable commissioner, has done much valuable work in the protection of the people of the State, and in cases permitting constructions that interpretation should be adopted which is best promotive of the public policy and beneficent purpose of the law. There is no error, and the judgment of the Superior Court is affirmed.

No error.

STATE v. J. J. DAVIS.

(Filed 20 December, 1911.)

1. **Usury—Furniture—Misdemeanor—Debtor and Creditors—Classification—Constitutional Law.**

   Our Legislature has the power under its police regulations to make the taking of usury on household and kitchen furniture a criminal offense, and the right of classification, in the enforcement of proper police regulations on this subject, is referred, very largely, to the legislative discretion.

2. **Same.**

   Revisal, sec. 3712 (a), which makes it a misdemeanor for "any person, firm, or corporation" to loan money "by note, chattel mortgage, conditional sale, or otherwise, upon any article of household or kitchen furniture," at a greater rate of interest "than six per cent before or after such interest shall accrue, etc.," is a classification on a reasonable ground, and not an arbitrary selection, and therefore not objectionable as an unlawful division of money-lenders into two classes within the intent and meaning of the fourteenth amendment of the Federal Constitution.

3. **Same—Interpretation of Statutes—Usury Charged or Reserved.**

   It was proven that the defendant, indicted under Revisal, sec. 3712 (a), made a loan of $10, taking a note for $16.75, secured by a mortgage on household and kitchen furniture, worth at least $25: *Held*, under the language of our statute, the charge of the usurious interest constituted the offense without the necessity of having received it; and under the facts of this case an usurious rate of interest for the period of the loan, to wit, $1.75, was actually reserved.

APPEAL from *Lyon, J.*, at July Term, 1911, of FORSYTH.

Criminal action for taking unlawful interest, tried on appeal from the municipal court.

There was evidence on the part of the State tending to show that, on or about 24 October, 1910, John Wolff, desiring to borrow $10, applied to one A. R. Bridgers, who was lending money for defendant; that the said Bridgers, with the knowledge, assent, and direction of defendant, advanced to said Wolff $8.25, taking his note to himself as attorney for defendant, in the sum of $16.75, payable in thirty days, and to secure same took a chattel mortgage on the household and kitchen furniture of said Wolff. That the property included in the mortgage had originally cost about $75 and was worth at the time the mortgage was executed about $25. That Wolff paid on the debt $3.50, and default having been made, the property was seized under claim and delivery and sold at public auction for $10.45. "The auctioneer cost $1; costs, claim and delivery, $3 or $4; credit on mortgage, about $4, and after applying proceeds as indicated, there was balance claimed by defendant of about $2.50."

There was evidence on part of defendant tending to show that there were claims included in the mortgage other than the money loaned and that the usurious features of the transaction were without the knowledge or approval of the defendant. On a charge, correctly stating the law as declared in the statute, there was verdict, "Guilty." Judgment, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General George L. Jones for the State.

L. M. Swink for defendant.

HOKE, J., after stating the case: The statute law of the State more directly relevant to the question presented, Revisal, sec. 3712 (a), among other things, makes provision as follows: "If any person, firm, or corporation who shall or may loan money in any manner whatsoever by note, chattel mortgage, conditional sale, or otherwise, upon any articles of household or kitchen furniture, shall take, receive, reserve, or charge a greater rate of interest than 6 per cent, either before or after such interest shall accrue," etc., "shall be guilty of a misdemeanor," etc.

Under a charge which correctly states the provisions of the statute, the jury have found that usurious interest has been charged by defendant; that the obligation was secured by a mortgage on the household and kitchen furniture of the debtor. There is ample evidence to justify the verdict, and the conviction must be upheld if the statute itself is a valid law. It is insisted for the defendant that the statute is in contravention of the fourteenth amendment to the Federal Constitution in that it "unlawfully divides money-lenders into two classes, those lending on household and kitchen furniture and on other kinds of property, and unlawfully discriminates against borrowers, putting borrowers, having only one class of property, to wit, household and kitchen furniture, into a class different from the borrower having other kinds of property to offer"; but the position cannot, in our opinion, be maintained.

The power of the Legislature to make the taking of usury, under certain conditions, a criminal offense is well recognized. *Ex parte Edward Berger,* 193 Mo., 16; *S. v. Winkenhoepper,* 6 Del., 120, and the right of classification, in the enforcement of reasonable and proper police regulations on this and other subjects is referred, very largely, to legislative discretion.

In *Insurance Co. v. Daggs,* 172 U. S., at page 362, the Supreme Court of the United States, the Court having, with us, the final word on this subject, referred to this right of classification as follows: "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This Court has had many occasions to do so, and only lately reviewed the subject in *Magoun v. Illinois Trust and Savings*

Bank, 170 U. S., 283. We said in that case that 'The State may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary," the limitation being that "the classification has been made on some reasonable ground, something that bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." *Ellis v. R. R.,* 165 U. S., 151; *Morris-Scarboro Co. v. Express Co.,* 146 N. C., 170, and numerous and repeated decisions of that Court are in affirmance and illustration of this principle. *Avenue Coach Co. v. New York City,* 221 U. S., 467; *Lindsay v. Gas Co.,* 220 U. S., 61; *Engel v. O'Mally,* 219 U. S., 128; *Bank v. Kansas,* 219 U. S., 121; *McLean v. Arkansas,* 211 U. S., 540; *Heath v. Mulligan Manufacturing Co.,* 207 U. S., 338; *N. Y. v. Van DeCarr,* 199 U. S., 552; *Loon Hing v. Crawley,* 113 U. S., 704. In *Coach Co. v. N. Y., supra,* it was held: "Classification based on reasonable distinctions is not an unconstitutional denial of equal protection of the laws; and so held that an ordinance of the city of New York prohibiting advertising vehicles in a certain street is not unconstitutional as denying equal protection to a transportation company operating stages on such street, either because signs of the owners may be displayed on business wagons or because another transportation company may display advertising signs on its structure. There is a purpose to be achieved, as well as a distinction, which justifies the classification." In *Lindsay v. Gas Co.,* the Court said: "The equal protection clause of the fourteenth amendment admits of a wide exercise of discretion, and only avoids classification which is purely arbitrary, being without reasonable basis. Nor does a classification having some reasonable basis offend because not made with mathematical accuracy or resulting in some inequality." And in *Engle v. O'Mally, supra,* it is said, approving the same statement in *Heath v. Mulligan Co.,* 207 U. S., 338: "That legislation which regulates business may well make distinctions depend upon the degree of evil, and although when size is not an index, a law may not discriminate between the great and the small proper regulations based thereon, when size is an index of the evil to be prevented, do not offend the equal protection clause of the fourteenth amendment. In *McLean v. Arkansas*, 211 U. S., *supra*, a regulation establishing a different method of mining coal, by which the wages of laborers were to be ascertained between miners when less than ten miners were employed and those having a larger number was implied. And on this very subject of usury and in *Berger's case, supra,* differing penal provisions were upheld in case of ordinary usury, and when the charge was greater than 2 per cent per month. And in *Winkenhoepper's case, supra,* between loans not exceeding $100 and loans of that sum or greater.

If these various classifications have been sustained by our highest Court, assuredly a law designed and intended to protect and maintain the home of the citizen should be upheld. If the schools of thought which tend to corrupt and undermine, if the forces which make for disorder and anarchy should ever be able to combine and so far increase as to threaten our social fabric, it is the home, the influences that hallow and emanate from it, which will arise and be potent to save.

Referring to this subject as a proper basis for classification, our Attorney-General, in his argument before us, has well said: "Prior to the adoption of the present Constitution, household and kitchen furniture to the value of $200 was exempt from execution. The lawmaking power of this State has always realized that the loss of those articles necessary for comfortable and decent living entails great suffering upon women and children, frequently resulting in the breaking up of a home and in the creation of conditions which are a menace to the public health and to the public prosperity.

"The statute under consideration is a logical and lawful extension of the protection which it has always been the policy of the law to afford this peculiar class of property. The General Assembly knew that the man who mortgages his household goods does so because he has nothing else to mortgage. He is the poor man, the illiterate man, and his poverty and his ignorance make him the easy prey of the usurer.

"The General Assembly also knew that in some of the cities of the State there were springing up a class of men who were selling money, like furniture, on the installment plan. It was to save the things necessary to the existence of a home from the grasp of such men that the act of 1907 was passed.

"We submit that the statute tends to preserve the domestic peace, to promote the family health and prosperity, and is a valid exercise of the police power of the State.

"It is not class legislation; it operates alike on all who take mortgages on household and kitchen furniture. It regulates a business and does not create a class."

It was further contended that inasmuch as the property on its sale had not repaid the actual amount of the loan, no usury had been received and therefore no violation of the statute had been established, citing *Rushing v. Bevins,* 132 N. C., p. 273. That was an action by the debtor to recover a penalty allowed by the statute of "twice the amount of usury paid," and the Court held, in effect, that to justify a recovery, it must be made to appear that usurious interest had been paid in money or money's worth, and a note of the debtor, given therefor, did not amount to such payment. The case does not apply here, when the statute makes it a misdemeanor to take, receive, reserve, or charge a greater rate than 6 per cent.

The evidence of the State tends to establish that "for a loan of $10 a note of $16.75 was taken, secured by a mortgage on household and kitchen furniture worth at least $25," which would constitute an usurious transaction within the meaning of the statute. 5 A. and E., p. 886, citing *Bank v. Wareham Co.,* 49 N. Y., 635; and, in any event, it appears further that on a loan of $10 for thirty days, $1.75 was reserved at the time the money was supplied.

There is no error, and the judgment must be affirmed.

No error.

INDEX.

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ABANDONMENT. See Divorce, 2, 3.

ABUTTING OWNER. See Highways, 6, 7.

ACCIDENT. See Negligence, 43.

ACCOUNT. See Trusts and Trustees, 3.

ACCOUNT AND SETTLEMENT. See Executor and Administrator, 4, 9.

ACCOUNTING. See Pleadings, 17.

ADMISSIONS. See Evidence, 111, 112; Reference, 3.

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ADVERSE POSSESSION. See Limitation of Actions, 8.

AFFIDAVITS. See Appeal and Error, 9; Divorce, 4, 5, 6, 7, 8, 9.

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ANCIENT DEEDS. See Deeds and Conveyances, 16.

APPEAL AND ERROR. See Instructions, 14, 15, 22.

1. *Appeal and Error—Reference—Findings—Evidence.*—The facts found by the referee and confirmed by the trial judge are not reviewable on appeal when there is evidence to support them; and exceptions to such findings, that they are "contrary to the weight of the evidence," cannot be sustained. *Jeffords v. Waterworks Co.*, 10.

2. *Evidence—Objections and Exceptions—Appeal and Error—Harmless Error.*—Over defendant's objection, plaintiff was permitted to ask the witness of the former if he had not sold his land to the defendant at a big price: *Held*, if on the

APPEAL AND ERROR—*Continued.*

facts the answer had a reasonable and natural tendency to create a bias in defendant's favor it was relevant; and if otherwise, it would be harmless and not reversible error. *Curry v. Fleer*, 16.

3. *Appeal and Error—Failure to Docket—Motion to Dismiss—Practice.*—A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of Court to which the appeal is returnable, and before the case is docketed. Supreme Court Rule 17. *Mirror Co. v. Casualty Co.*, 28.

4. *Same.*—When the appellant dockets his case on appeal in the Supreme Court at any time after the end of the term to which it is returnable, it will be dismissed, on motion. *Ibid.*

5. *Same—Motion to Reinstate.*—An appellant is required by Rule 17 of the Supreme Court to move for a reinstatement of his case, after its dismissal upon motion of appellee, during the same term of the Court. *Ibid.*

6. *Appeal and Error—Appeal Abandoned—Motion to Dismiss—Practice.*—When it appeared from the record on file in the Supreme Court, that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed. *Ibid.*

7. *Appeal and Error—Service of Case—Extension of Time—Agreement in Writing—Practice.*—When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Supreme Court Rule 39. *Ibid.*

8. *Appeal and Error—Service of Case—Extension of Time—Attorney and Client—Directions.*—An attorney for appellee has no authority to extend the time for the appellant's attorney to serve his case on appeal when he has been forbidden by his client to do so. *Ibid.*

9. *Appeal and Error—Service of Case—Returns of Officer—Affidavit—Corrections.*—In this case it was proven by the affidavit of the officer that though by his return upon the original statement of case on appeal by appellant it appears that the case was served on a certain date and in time, it was not in fact served until after the expiration of the time allowed or extended by agreement, and appellee's motion to dismiss is allowed. Officers serving papers are cautioned

APPEAL AND ERROR—*Continued.*

to make accurate returns, as, in law, they import verity and are *prima facie* evidence of their correctness. *Ibid.*

10. *Appeal and Error—Objections and Exceptions—Answers of Witness—Evidence—Motion to Strike Out—Procedure.*—If an answer by the witness to a competent question is not excepted to, the competency of the answer will not be considered on appeal under an exception noted to the question. The objecting party should either have excepted to the answer at the time it was made or move the trial judge to strike it from the evidence. *Wacksmuth v. R. R.*, 34.

11. *Appeal and Error — Instructions — Presumptions.*—When the charge of the trial court is not set out in the record on appeal it is assumed that he fully explained to the jury the significance of an issue submitted and the bearing of the evidence thereon. *Ibid.*

12. *Objections and Exceptions — Former Testimony — Harmless Error.*—When objection is made to the admissibility of evidence theretofore testified by the witness, without objection, the error in admitting it, if any committed, is without prejudice to the objecting party, and harmless. *Young v. R. R.*, 74.

13. *Carriers of Goods—Delayed Delivery—Measure of Damages—Instructions—Agreement of Counsel—Appeal and Error.*—In this action for damages alleged to have been caused by the negligence of defendant carrier in transporting a shipment of goods: *Held*, not error for the trial judge to omit to charge the jury upon the rule of the measure of damages, it appearing that the counsel for both parties had agreed on the trial, in the presence of the jury, and with the sanction of the court, that the damages should be the difference in value between the market price of the goods when delivered and the actual value of the damaged goods, should the defendant be held answerable. *Young v. R. R.*, 74.

14. *Appeal and Error — Account — Reference—Slander—Damages —Appeal Premature—Practice.*—In an action against a bank, alleging certain errors in the accounts of the bank with the plaintiff and asking correction thereof, and seeking damages for slander, injury to credit, and the wrongful protesting of plaintiff's checks, an order of reference was made as to the matters of account, expressly reserving for trial the issues in the pleadings as to slander, etc.: *Held*, an appeal from the judgment upon exceptions to the referee's report, before the trial upon the issues reserved, is premature, and will be dismissed without prejudice. *Beck v. Bank*, 105.

APPEAL AND ERROR—*Continued.*

15. *Instructions, Correct in Part—Appeal and Error.*—A prayer for special instruction which in part correctly states a proposition of law, and incorrectly applies it to the matters in evidence, is improper, and should be refused. *Phifer v. Commissioners*, 150.

16. *Courts, Justices'—Appeal—Time of Docketing—Procedure.*—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the Superior Court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Revisal, sec. 608. *Peltz v. Bailey*, 166.

17. *Same — Recordari — Laches—Attorney and Client.*—When an appeal from a justice's court has not been docketed within the time prescribed by the statute (Revisal, sec. 608), the appellant should move for a *recordari*, at the first ensuing term of the Superior Court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a *recordari* and to make proper inquiry of the clerk of the Superior Court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that the appellant has employed an attorney to look after the appeal will not excuse him. *Ibid.*

18. *Nonresidents—Judgment Set Aside—Request to Plead—Appearance.*—A request of nonresident defendants to answer the complaint, in their application to have a judgment set aside for irregularities, is equivalent to a general appearance. *Currie v. Mining Co.*, 209.

19. *Verdict—Judgment—Extent of Error Ascertained—Supreme Court—Procedure.*—Where under an erroneous instruction the jury has awarded double the amount of the damages actually sustained by the plaintiff in an action of trespass and unlawful cutting of timber trees in the counties specified in the Laws of 1907, ch. 320, and it can readily be ascertained from the verdict what sum is properly recoverable, the correction will be made in the Supreme Court without granting a new trial. *Lumber Co. v. Hayes*, 333.

20. *Appeal and Error—Lower Court—Presumption of Correctness of Ruling—Exceptions to Questions Ruled Out—Prejudice.*—One appealing from an exception to the action of the lower court in excluding a question asked of a witness must show

APPEAL AND ERROR—*Continued.*

that he has been prejudiced thereby, the presumption being in favor of the correctness of the ruling in the lower court; and when this does appear of record the exception cannot be sustained. *Watts v. Warren*, 108 N. C., 517, cited and distinguished. *Stout v. R. R.*, 366.

21. *Same—Proximate Cause—Instructions—Appeal and Error.*—Under the circumstances of this case, instructions as to whether the plaintiff's train remaining upon the defendant's track after the expiration of its ten minutes permit was or was not the proximate cause of the injury received by a collision from defendant's train on its main line, with its imminent chances of arrival: *Held*, reversible error to defendant's prejudice, for which a new trial is granted. *R. R. v. R. R.*, 369.

22. *Appeal and Error—Assignments of Error—Objections and Exceptions.*—An assignment of error not based on any exception appearing of record will not be considered on appeal. *Morse v. Freeman*, 385.

23. *Issues—Pleadings—Appeal and Error.*—When the issues submitted arise from the pleadings and present all the contentions of the parties it will not be held as reversible error on appeal for the court to refuse to submit other issues. *Arthur v. Henry*, 393.

24. *Inconsistent Instructions—Appeal and Error.*—An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is reversible error. *Patterson v. Nichols*, 406.

25. *Appeal and Error—Objections and Exceptions—Harmless as to One Defendant.*—When there are two or more defendants and an exception to the admissibility of evidence is taken so that it does not appear by which one, it will not be held reversible error on appeal when it is harmless as to one of them. (Rule 27, 140 N. C., 495.) *Whitehurst v. Padgett*, 424.

26. *Instructions—Verdict, Directing—Appeal and Error—Absence of Evidence.*—An instruction by the Superior Court, that if the jury find from the evidence the existence of certain facts, to answer an appropriate issue in a certain way, cannot be reviewed in the Supreme Court when the evidence referred to is not disclosed by the record. *Beard v. Taylor*, 440.

27. *Appeal and Error—Case Agreed—Stenographer's Notes.*—An agreement by counsel that the record proper and stenogra-

APPEAL AND ERROR—*Continued.*

pher's notes shall constitute the case on appeal will not be considered by the Supreme Court, as such is in direct violation of Rule 22. *Cressler v. Asheville*, 138 N. C., 483, cited and applied. *Bucken v. R. R.*, 443.

28. *Reference Set Aside—Discretion—Appeal and Error.*—The setting aside an order of reference by the trial judge upon the exercise of a lawful discretion is not reviewable on appeal. *Lance v. Russell*, 448.

29. *Reference—Set Aside—"Good Cause Shown"—Appeal and Error.*—The judge, by finding as a fact that one who was a necessary party to be bound had not consented to the reference, and that the objecting party had therein been misled, establishes a "good cause shown," and his action in setting aside the former order and report of the referee thereon is not error. *Ibid.*

30. *Appeal and Error—Stenographer's Notes—Contentions—Immaterial Matter—Costs.*—When, at the instance of a party, the trial judge sends up on appeal the contentions of the parties, not needed to enlighten the Court, and puts in a large part of the testimony in the form of stenographer's notes instead of in narrative form, which was excepted to, the unnecessary matter will be estimated and taxed against the party at whose instance they were incorporated into the record on appeal. *Brazille v. Barytes Co.*, 454.

31. *Appeal and Error—Second Appeal—Motion to Rehear—Procedure.*—A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being in the Supreme Court by a motion to rehear. *Hospital v. R. R.*, 460.

32. *Execution—Debtor and Creditor—Appeal and Error—Pleadings—Reformation—Issues—Procedure.*—It appearing in this suit that the creditors of an insolvent defendant are entitled to have improvements put upon his wife's land with his funds subjected to the payment of their debts, from which the debtor may claim his personal property exemption were the pleadings properly drawn to present the issue, the case is remanded with direction to reform the pleadings in accordance with the principles declared, and to submit issues for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and, also, the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary. *Michael v. Moore*, 462.

APPEAL AND ERROR—*Continued.*

33. *Statutes of Frauds—Contracts—Specific Performance—Appeal and Error—Notification in Decree—Costs.*—When the trial court decrees that the vendor of lands make deed to the vendee and file it with the clerk of the court, and that the vendee pay into court the purchase money, without fixing a time in which it is to be done, in an action for specific performance of a contract this Court will direct, when it appears that it should be done, that the order be modified by the lower court so that such reasonable time be specified. *Bateman v. Hopkins*, 470.

34. *Negligence — Electricity — Dangerous Instrumentalities — Fellow-servant—Instructions—Appeal and Error.*—When there is evidence tending to show that the plaintiff's intestate was killed by the negligence of the defendant in failing to furnish him a proper appliance for stretching its telegraph wires over and in close proximity to heavily charged wires of another company furnishing electricity for light and power purposes, or in providing a guard wire to prevent contact between the telegraph wire he was handling and the live wire of the other corporation, which caused the injury, a modification of a prayer for special instruction upon the application of the doctrine of the liability of the defendant for the negligence of a fellow-servant is not material, when it appears that the trial judge instructed the jury that if the injury was proximately caused by the negligent act of the fellow-servant the plaintiff could not recover. *Hicks v. Telegraph Co.*, 519.

35. *Appeal and Error—Executors and Administrators—Account and Settlement — Reference — Findings—Attorneys' Fees.*—When fees for attorneys employed by an administrator are found as a fact by a referee to have been unnecessary, and this finding has been approved by the judge of the lower court, the ruling of that court will be approved on appeal, when there is evidence to support it. *Overman v. Lanier*, 544.

36. *Executors and Administrators—Management of Estate—Personal Liability—Appeal and Error.*—Upon the findings of fact by the referee, confirmed by the judge, in this case, as to the administrator's management and sale of a distillery interest and liquor belonging to the estate, the defendant's exceptions of law cannot be sustained. *Ibid.*

37. *Appeal and Error—Unnecessary Matter—Stenographer's Notes—Cost.*—Upon objection duly entered to the sending up on appeal of the stenographer's notes with questions and an-

APPEAL AND ERROR—*Continued.*

swers, instead of in a narrative form, the unnecessary additional pages thus made will be taxed against the party at whose instance it is done. *Ibid.*

38. *Executors and Administrators — Partial Recovery — Costs — Statement—Reformation—Interest.*—In this action, in the nature of one to personally charge the administrator with certain debts of the estate, there was final recovery of about $6,000 in excess of the sum the administrator admitted to be due; and all costs should be taxed against him but for the fact that the heirs and distributees unsuccessfully sought to recover further and larger sums; it is adjudged that the cost of the litigation be divided between the parties and that the account of the administrator be reformed, and that interest be charged on the correct amount due by him from the date of his filing his report. *Ibid.*

39. *Insurance, Fire—Title—Evidence—Issued to "Insured"—Possession.*—Evidence that the policy of insurance "was issued to the insured," and that the insured was in possession and control of it, is sufficient upon the question of the plaintiff's title, in his action to recover damages from fire to his property on his policy of insurance, and conclusive unless in some way questioned or impeached. *Sanitarium Co. v. Insurance Co.*, 551.

40. *Reference—Findings—Evidence—Appeal and Error.*—Findings of the referee approved and adopted by the judge upon any competent evidence are not reviewable on appeal. *Culver v. Jennings*, 565.

41. *Reference—Findings of Fact—Evidence—Appeal and Error.*—The findings of fact by the referee upon competent evidence, confirmed by the trial judge, are not reviewable on appeal. *Church v. Dawson*, 566.

42. *Same — Exceptions—Error Assigned—Procedure.*—The Court will not review exceptions of law to a referee's report unless they are passed upon by the trial judge and unless the judge's rulings are especially assigned as error in the transcript on appeal sent to the Supreme Court. *Ibid.*

43. *Courts—Discretion—Counterclaim—Amendments—Appeal and Error.*—The filing of an amended answer setting up a counterclaim is in the discretion of the trial judge and is not reviewable on appeal. *Ibid.*

44. *Appeal and Error—Exceptions, Broadside.*—An exception to the judgment of the lower court affirming the referee's report is a broadside exception, and will not be considered on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

45. *Reference — Exceptions Abandoned Below — Waiver.*—Exceptions to a referee's report abandoned before the trial judge are deemed as waived on appeal. *Ibid.*

46. *Objections and Exceptions—Broadside Exceptions—Appeal and Error.*—An exception to the entire charge, containing several distinct propositions and much evidence, upon an issue, without specifying the errors complained of, will not be considered on appeal. *Lumber Co. v. Moffitt*, 568.

47. *Objections and Exceptions — Contentions — Evidence—Appeal and Error.*—Exceptions to the statement of the trial judge of the contention of the parties upon the evidence are not reviewable on appeal. *Ibid.*

48. *Appeal and Error—Assignments of Error—Placing.*—The exceptions grouped and relied on by the appellant in the Supreme Court are properly placed at the end of his case on appeal. *Keller v. Fiber Co.*, 575.

49. *Appeal and Error.*—The questions in this case of color of title, adverse possession, and competency of evidence: *Held*, to have been decided correctly in the court below, and no error is found. *Rexford v. Martin*, 577.

50. *Appeal and Error—Brief—Exceptions Deemed Abandoned.*—Assignments of error in the record excluded from the brief are regarded as abandoned in the Supreme Court on appeal. *Rogers v. Manufacturing Co.*, 484.

51. *Appeal and Error — Objections and Exceptions — Evidence — Practice.*—Exceptions to evidence objected to must be taken in order to make the matter available on appeal. *Worley v. Logging Co.*, 490.

52. *Appeal and Error—Objections and Exceptions—Instructions—Practice.*—Exceptions to the charge may be taken for the first time when the case on appeal is settled, and they should point out the parts of the charge to which exceptions are taken. *Ibid.*

53. *Appeal and Error—Assignments of Error—Case on Appeal—Exceptions Noted.*—Assignments of error is not a part of the case on appeal and has for its purpose the grouping of exceptions noted in the case on appeal, which, if not noted, cannot be availed of as an assignment of error. *Ibid.*

54. *Same—Agreement of Parties—Interpretation.*—When it appears upon a case on appeal settled by the parties, over their signatures, that each assignment of error begins "the defend-

APPEAL AND ERROR—*Continued.*

ant (appellant) excepted for that, etc.," the Supreme Court will assume that the exceptions upon which error was assigned were duly entered. *Ibid.*

55. *Statutes—Alternate Punishments—Discretion of Courts—Leniency—Appeal and Error.*—When a statute makes certain acts an offense and punishable by "fine and imprisonment," the trial judge may impose either punishment or both; but if it were otherwise, a defendant has no ground for appeal that both sentences were not imposed on him. *S. v. Blake*, 608.

56. *Attorney and Client—Jury—Argument—Law and Fact—Decisions—Application of Law—Improper Remarks—Appeal and Error.*—Under our statute, attorneys are allowed to argue the whole case to the jury, both as to the law and facts, and they are permitted to state the facts of a decision relied on only to the extent of applying the law of such case to the one being tried; hence, upon a trial for seduction under breach of promise of marriage, it is reversible error for the solicitor to be permitted to read the facts stated in an opinion of the Supreme Court relating to a trial for seduction and say, over objection of the defendant, that the jury had convicted the defendant in that case under weaker evidence than in the case at bar. *S. v. Corpening*, 621.

57. *Instructions—Contentions Stated by Judge—Appeal and Error.*—It is the duty of the court to state the contentions of the parties which are supported by the evidence, and his thus doing so is not error. *S. v. Grainger*, 628.

APPEARANCE. See Judgment, 4.

APPRAISERS' REPORTS. See Exemptions, 2.

ARBITRATION AND AWARD.

Railroads—Relief Department—Rules and Regulations—Sick Benefits—Ability to Work—Arbitration and Award.—A contract which provides that the amount of damages which may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement, is valid and will be upheld. Hence, if the principles governing arbitration and award were applicable, when a member of the relief department of a railroad company has voluntarily appealed to the advisory committee of the relief department of a railroad company, under the rules and regulations of the department, upon the question as to whether

ARBITRATION AND AWARD—*Continued.*

he was able to again resume his work, or continue to receive the sick benefits he had been drawing, he will be presumed to know the rules and regulations applicable and to have acquiesced in this method of adjustment, and is bound by the final decision of the committee, made in good faith and without oppression or fraud. The application of this doctrine to benefit societies and fraternal orders discussed by ALLEN, J. *Nelson v. R. R.*, 194.

ARGUMENTS. See Appeal and Error, 56.

ASSAULTS AND BATTERY. See Trespass, 7; Master and Servant, 32; Rape, 1, 2, 3, 4.

ASSIGNMENTS. See Insurance.

ASSIGNMENTS OF ERROR. See Appeal and Error.

ASSUMPTIONS OF RISKS. See Master and Servant, 35, 36, 43; Contributory Negligence, 3, 5.

ATTACHMENTS.

Process—Publication—Attachment—Property—Debt—Status.—A judgment by default final against two nonresident defendants, A and G, will be set aside for irregularity when it appears from the complaint that A had no property within the State, and the ground of relief is based upon an alleged assignment by A to the plaintiff of a debt for the purchase money of lands situated here, against which an attachment has been sued out, without allegation that G knew of its assignment, or of the status of the debt owed by A or of what disposition had been made of it, the liability of G being determined as of the time of the levy of the attachment, and the allegations therefore not being sufficiently definite. *Currie v. Mining Co.*, 209.

ATTORNEY AND CLIENT. See Executor and Administrator, 2, 3; Deeds and Conveyances, 22.

1. *Appeal and Error—Service of Case—Extension of Time—Attorney and Client—Directions.*—An attorney for appellee has no authority to extend the time for the appellant's attorney to serve his case on appeal when he has been forbidden by his client to do so. *Mirror Co. v. Casualty Co.*, 28.

2. *Courts, Justices'—Appeal—Recordari—Laches—Attorney and Client.*—When an appeal from a justice's court has not been docketed within the time prescribed by the statute (Revisal, sec. 608), the appellant should move for a *recordari*, at the first ensuing term of the Superior Court, that the appeal

ATTORNEY AND CLIENT—*Continued.*

should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a *recordari* and to make proper inquiry of the clerk of the Superior Court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him.—*Peltz v. Bailey*, 166.

3. *Principal and Surety—Attorney at Law—Collection of Debt—Extension of Time—Authority Implied.*—An attorney employed simply to collect a note has no authority to extend the time for its payment so as to release the other parties bound thereon, or to do any act which will jeopardize his client's interest. An attorney can only collect in cash, and without express authority, or conduct equivalent to authority, cannot temporize with the debtor to the prejudice of the creditor.—*Hall v. Presnell*, 290.

4. *Same.*—An accommodation paper with sureties was deposited by the payee with a bank as collateral to a note given the bank for a loan to him. At the request of one of the sureties, the maker of the collateral note gave a chattel mortgage to the payee thereof to secure the debt and indemnify the sureties, which was duly registered. The bank sent the note made to it, with the collateral, to an attorney for collection, who allowed the maker of the collateral note several days in which to sell the mortgaged chattels and pay the note, but subsequently sold them under the mortgage and applied the proceeds to the payment of the note, which proved to be insufficient for the purpose: *Held*, the act of the attorney in granting the maker of the collateral note time in which to sell the mortgaged chattels and pay the note did not operate as a discharge of any of the parties. *Ibid.*

5. *Attorney and Client—Principal and Agent—Waiver of Client's Rights—Ratification—Estoppel.*—As a general rule, an attorney cannot waive any of the substantial rights of his client without the latter's consent, and he is not bound by the attempted waiver, unless there be a ratification, or something which amounts to an estoppel. *Ibid.*

6. *Attorney and Client—Jury—Argument—Law and Fact—Decisions—Application of Law—Improper Remarks—Appeal and Error.*—Under our statute, attorneys are allowed to argue the whole case to the jury, both as to the law and facts, and

ATTORNEY AND CLIENT—*Continued.*

they are permitted to state the facts of a decision relied on only to the extent of applying the law of such case to the one being tried; hence, upon a trial for seduction under breach of promise of marriage, it is reversible error for the solicitor to be permitted to read the facts stated in an opinion of the Supreme Court relating to a trial for seduction and say, over objection of the defendant, that the jury had convicted the defendant in that case under weaker evidence than in the case at bar. *S. v. Corpening*, 621.

AUTOMOBILES. See Highways, 1, 2, 3.

AYE AND NO VOTE. See Constitutional Law, 14.

BANKS AND BANKING. See Principal and Agent, 8.

BENEFITS. See Railroads.

BILLS AND NOTES.

1. *Insurance — Premium — Notes—Extension—Parol Evidence—Payment.*—When upon its face in express terms a note given by an insurer for a premium due on his life insurance policy declares that the policy is void if the note be not paid when due, the position is not available that the note was given for the payment of the premium and not for an extension of time within which to pay it. *Sexton v. Insurance Co.*, 142.

2. *Bond Issues—Precincts—Legislative Authority—Sinking Funds — Restricted Levy — Negotiable Instruments — Particular Fund.*—A legislative act empowering the issuance of bonds by a precinct for building and maintaining, etc., its public roads, authorizing taxes to be computed and levied on all taxable property therein, does not restrict the payment of the bonds so as to render them nonnegotiable by providing a maximum rate of taxation upon the property and poll; and, further, that "no sinking fund shall be created within less than ten years from the date of issuing said bonds," but allowing the properly constituted authorities to use, for the purposes of the act, "such sums of money remaining after the interest on said bonds shall have been paid"; and the bonds issued thereunder containing an unconditional promise to pay a sum certain in money at a fixed time to bearer, are a compliance within the provision of our negotiable instrument act as to the negotiability of a paper, which indicates a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount. *Commissioners v. Bank*, 191.

BILLS AND NOTES—*Continued.*

3. *Bond Issues—Precincts—Legislative Authority—Tax Levy—Restrictions—Payment—Negotiable Instruments.*—A legislative authority to a precinct to issue bonds and levy taxes on all taxable property for the purposes of the act, does not affect the ultimate liability of the precinct for their payment in full by restricting the tax levy to a certain amount upon the property and poll. *Ibid.*

4. *Corporations—Bills and Notes—President—Authority—Ultra Vires—Consideration.*—A bank desiring to borrow money from its correspondent bank hypothecated as collateral to its own note a note obtained from the president of a local oil mill corporation, signed with the name of the corporation by the president, without any consideration moving to the oil company being shown. The local bank being insolvent, the correspondent bank, as an innocent purchaser for value, sued the oil company on the collateral note, and the defense was the failure of consideration and lack of authority of the president to give the corporation's note. A motion to nonsuit was improperly sustained. *Bank v. Oil Co.*, 302.

BILLS OF LADING. See Carriers of Goods, 5, 6, 7, 8, 9, 10, 11.

BILLS OF PARTICULARS. See Motions, 18.

BILLS OF RIGHTS. See Constitutional Law, 12.

BOND ISSUES.

1. *Bond Issues—Legislative Authority—Constitutional Law—Taxation.*—The requirement of the Constitution as to the calling and recording of the "aye" and "no" vote, having been met in all particulars relating to the issuance of bonds by the town of Red Springs for water and sewerage purposes, the validity of the issue can neither be successfully resisted nor the collection of taxes for the purpose restrained. *Hotel Co. v. Red Springs*, 137.

2. *Bond Issues—Legislative Authority—Necessaries—Vote of People.*—When it appears that a municipality, desiring to issue bonds for water and sewerage purposes, and a legislative enactment authorizing their issuance, have declared the purpose thereof to be a necessity, the validity of the bonds cannot be successfully attacked upon the ground that they were not duly authorized by a vote of the qualified voters of the town. *Ibid.*

3. *Bond Issues—Legislative Authority—Municipal Authorities—Rate Taxed.*—An act of the Legislature authorizing a municipality to issue bonds for a water and sewerage system, allow-

BOND ISSUES—*Continued.*

ing the boards of commissioners and of public works thereof to fix a rate of interest thereon of "not more than 6 per cent," when the bonds are issued, does not invalidate the issue because no rate of interest was fixed by the act. *Ibid.*

4. *Bond Issues—Rate of Taxation—Sinking Fund—Constitutional Law.*—A bond issue of a town duly authorized by legislative enactment is not objectionable or invalid because at the present rate of taxation an insufficient revenue is obtained for a sinking fund to retire the bonds at maturity and to pay the interest thereon. *Lumberton v. Nuveen*, 144 N. C., 303, cited as controlling. *Ibid.*

5. *Bond Issues—Water and Sewerage—Division of Proceeds—Municipal Discretion.*—A legislative grant of authority to a town to issue bonds for the purpose of providing a necessary waterworks and a necessary sewerage system, is not invalid because it provides for these two purposes in one bond issue, leaving the division of the proceeds for each purpose to the discretion of the municipal authorities, where it can be more intelligently exercised. *Ibid.*

6. *Bond Issue—Sewerage and Water—Interpretation of Statutes.* The act of 1911, Public Laws, ch. 86, does not affect the validity of the bonds of Red Springs referred to in this case. *Ibid.*

7. *Bond Issues—Precincts—Legislative Authority—Sinking Funds—Restricted Levy—Negotiable Instruments—Particular Fund.*—A legislative act empowering the issuance of bonds by a precinct for building and maintaining, etc., its public roads, authorizing taxes to be computed and levied on all taxable property therein, does not restrict the payment of the bonds so as to render them nonnegotiable by providing a maximum rate of taxation upon the property and poll; and, further, that "no sinking fund shall be created within less than ten years from the date of issuing said bonds," but allowing the properly constituted authorities to use, for the purposes of the act, "such sums of money remaining after the interest on said bonds shall have been paid"; and the bonds issued thereunder containing an unconditional promise to pay a sum certain in money at a fixed time to bearer, are a compliance within the provision of our negotiable instrument act as to the negotiability of a paper, which indicates a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount. *Commissioners v. Bank*, 191.

BOND ISSUES—*Continued.*

8. *Bond Issues—Precincts—Legislative Authority—Tax Levy—Restrictions—Payment—Negotiable Instruments.*—A legislative authority to a precinct to issue bonds and levy taxes on all taxable property for the purposes of the act, does not affect the ultimate liability of the precinct for their payment in full by restricting the tax levy to a certain amount upon the property and poll. *Ibid.*

BOOKS. See Evidence, 70.

BRIEFS. See Appeal and Error, 50.

BURDEN OF PROOF.

1. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Promise—Contracts—Burden of Proof—Evidence—Questions for Jury.*—It is a voluntary acceptance by an employee, a member of a railroad company's relief department, of the benefits of that department, after an injury has been inflicted, that bars his right to recover damages from the company; and when the defense in the action is that the plaintiff had promised to accept the benefits, it is necessary for the defendant to show an acceptance of the promise and its performance thereof in order to render the defense available. *King v. R. R., post*, 44, cited as controlling. *Wacksmuth v. R. R.*, 34.

2. *Railroads—Relief Departments—Benefits Accepted—Consideration—Burden of Proof.*—When a railroad company sets up as a defense to an action for personal injury that the plaintiff was a member of its relief department and was concluded under the rules and regulations of that department, by accepting benefits, from bringing his action, whether a release, accord and satisfaction, or by whatever name called, and it appears that the defendant had full control of the department, with the power to make or alter the rules and regulations at will and to fix the membership fees, the burden is upon the defendant, relying upon the binding effect of the rules and regulations as a contract, to show that on its part it has paid a valuable consideration by introducing evidence of what it has paid or done for the support of the department, and it must be made to appear that the consideration was not so small that a person of ordinary discernment and judgment would consider that the defendant had paid nothing. *King v. R. R.*, 44.

3. *Master and Servant—Safe Place to Work—Negligence—Causal Connection—Burden of Proof.*—An employee must show, in his action for damages for personal injury alleged to have

BURDEN OF PROOF—*Continued.*

been negligently caused by the master's not furnishing him a safe place to work, that the negligence complained of was the real and proximate cause of the injury, and not merely that he was working at an unsafe place on the premises at the time. *Pritchett v. R. R.*, 88.

4. *Deeds and Conveyances—Privy Examination—Purchaser—Notice—Fraud—Burden of Proof.*—The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. *Brite v. Penny*, 110.

5. *Divorce, Absolute—Adultery of Wife—Burden of Proof—Actions at Law.*—While in certain instances of an equitable nature there is a requirement that the proof be "clear, strong, and convincing," and in criminal cases the State must prove its charge "beyond a reasonable doubt," this intensity of proof is not required in an action for absolute divorce brought by the husband on the ground of the wife's adultery, the action being one at law and only requiring proof of the act by the preponderance of the evidence. *Ellett v. Ellett*, 161.

6. *Slander—Intent—Evidence—Larceny—"Took" and "Stole"—Words and Phrases—Unequivocal Terms—Burden of Proof—Question for Jury.*—In an action for damages for slanderous words spoken by defendant of plaintiff, the evidence for plaintiff tended only to show that the defendant on several occasions had said to others that his brother had caught the plaintiff "taking some pokes of cotton out of his patch the night before," which he (the defandant) believed to be true; that on another occasion the plaintiff and defendant were together with the purpose of the latter to "make up the trouble," the former denying that he had taken the cotton, the latter insisting that he had, from the information his brother had given: *Held*, the evidence was not an unequivocal statement that plaintiff had stolen the cotton, and being capable of a different construction, was properly submitted to the jury, with the burden of proof on the plaintiff to show whether the words, in view of the circumstances under which they were used, naturally imported that the plaintiff had stolen the cotton, and whether defendant so intended to state. *Fields v. Bynum*, 156 N. C., 413, cited and distinguished. *McCall v. Sustair*, 179.

7. *Deeds and Conveyances—Chain of Title—Locus in Quo—Identification—Burden of Proof.*—In an action involving title to

BURDEN OF PROOF—*Continued.*

disputed lands it is for the party relying upon a deed in his chain of title to establish that it covered the *locus in quo*, and the failure of the trial judge to so charge in proper instances constitutes reversible error. *McBrayer v. Blanton*, 320.

8. *Executors and Administrators—Final Account and Settlement—Personal Liability—Wagering Contracts—Burden of Proof—Interpretation of Statutes.*—A petition by an administrator for a final account and settlement was resisted by the heirs at law and distributees, and the matter referred. In their answer, the defendants alleged that certain notes, valid on their face, were given for a gambling contract in cotton futures, and should not have been paid: *Held*, the provisions of Revisal, sec. 1691, do not apply so as to place the burden of proof on the administrator to show that the notes were given for a valid contract requiring the actual delivery of the cotton; and an exception by the defendant to the report of the referee in holding the payment of the notes a valid disbursement will not be sustained in the absence of any findings as to the nature of the contract for which they were given. *Overman v. Lanier*, 544.

9. *Master and Servant—Parent and Child—Employment of Child—Negligence—Safe Place to Work—Consent of Parent—Contract—Burden of Proof—Dangerous Surroundings.*—An actionable wrong is committed by the master in putting a minor child, 13 years old, to work under more dangerous conditions, against the consent of his father, than those under which the parent had agreed upon, and evidence of an injury inflicted upon the child while thus employed, without the knowledge or ratification of the parent, is sufficient to take the case to the jury, the burden of proof being on the plaintiff to establish the contract of employment in his action for damages for a negligent killing of the child. *Haynie v. Power Co.*, 503.

10. *Same—Duty of the Master.*—The master who has employed a minor child with the consent of the parent to work as a water carrier at a certain place, was injured while at a different place on defendant's property by being thrown from a belt operating defendant's machinery, with evidence tending to show that the defendant had agreed with the parent that the child should not be permitted to go there: *Held*, the master should not be held as an insurer, should the agreement alleged be proven, but only to use due diligence and care to keep the child away from the machinery and at the work he was hired to do, or else return him to his parent. *Ibid.*

BURDEN OF PROOF—*Continued.*

11. *Indictment—Assault—Rape—Jurisdiction Concurrent—Magistrate's Cognizance—Burden of Proof.*—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the Superior Court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission"; for it is for the defendant to show, as a matter of defense, the fact that jurisdiction had been thus taken. Revisal, sec. 1427. *S. v. Smith*, 578.

12. *Evidence, Circumstantial—Corroborative—Burden of Proof.*—When the question of defendant's guilt or innocence of the charge of theft depends mainly on the credit the jury may give the testimony of a State's witness, considered in connection with other evidence in corroboration and of a circumstantial character, and is without complication, it is not required that the judge should charge the jury that each circumstance which formed a link in the chain should be established to their full satisfaction. *S. v. Neville*, 591.

13. *Judgment—Motion in Arrest—Statutory Period—Instructions—Burden of Proof.*—When for conviction it is necessary to show the offense was committed within two years, the burden is upon the State to show it, which may be taken advantage of by the prisoner by a special request for instructions, and not by a motion in arrest of judgment after verdict. *S. v. Francis*, 612.

CARRIERS OF GOODS.

1. *Carriers of Goods—Delayed Delivery—Reasonable Time—Consignee's Readiness—Negligence—Evidence.*—When, in an action by the shipper against the carrier for damages to a shipment of fruit trees to his sales agent, alleged to have been caused by the carrier's negligence in an unreasonable delay in transportation and delivery, the defense is relied on that the plaintiff's agent was not ready to receive them when they arrived, it is competent for the plaintiff to show, in explanation why his agent did not wait for their arrival and upon the measure of damages, that orders had been obtained for the trees by traveling agents upon a salary, and they had been sold for a certain aggregate sum to various parties to be delivered when they called for them at destination upon notice at a certain time: and, also, an order from one of plaintiff's customers requiring the trees to be delivered accordingly. *Young v. R. R.*, 74.

CARRIERS OF GOODS—*Continued.*

2. *Same—Instructions, Affirmative and Converse.*—An affirmative instruction on the facts in this case by the judge to the jury as to the duty of the consignee of goods in being ready to receive the consignment unreasonably delayed in transportation by the carrier, for which damages are sought, that if the plaintiff called for them within a reasonable time and made a reasonable effort to receive them if they reached there within a reasonable time, then he was not required to stay there until they came, unless he had some notice as to when they would arrive; that if he made a reasonable effort to get them, and they did not arrive within a reasonable time, and they were lost to him on that account, then he would be entitled to recover damages, but otherwise he would not be, is not objectionable for that the converse of the proposition was not charged, the words "but otherwise he would not be" being sufficient. *Ibid.*

3. *Carriers of Goods — Negligence — Delayed Delivery — Consignee's Readiness—Issues, Relation of—Instructions.*—In an action for damages to a shipment of goods, alleging that they were caused by the failure of the carrier to transport them within a reasonable time, the first issue related to the reasonableness of the time of transportation, the second as to the injury caused thereby, and the third as to the amount of damages: *Held*, no error of the trial judge to instruct the jury in reference to the relations of the issues to each other, that if they answered the first issue "Yes," they should go to the next issue; and if they answered the second issue "Yes," they should find the damages under the third; and that if they should answer the first issue "No," they need not go further, but return their verdict. *Ibid.*

4. *Carriers of Goods—Delayed Delivery—Measure of Damages—Instructions—Agreement of Counsel—Appeal and Error.*—In this action for damages alleged to have been caused by the negligence of defendant carrier in transporting a shipment of goods: *Held*, not error for the trial judge to omit to charge the jury upon the rule of the measure of damages, it appearing that the counsel for both parties had agreed on the trial, in the presence of the jury, and with the sanction of the court, that the damages should be the difference in value between the market price of the goods when delivered and the actual value of the damaged goods, should the defendant be held answerable. *Ibid.*

5. *Carriers of Goods—Live-stock Bill of Lading—Negligence—Insurer—Exceptions.*—A railroad company's liability for negli-

CARRIERS OF GOODS—*Continued.*

gent injury to stock shipped under its usual live-stock bill of lading is that of a common carrier, with the exception that it is not held as an insurer against injuries arising from the natural or proper vices or the inherent nature and propensities of the animals themselves, unless the injuries from such sources are attributable, in whole or in part, to the carrier's negligence. *Harden v. R. R.*, 238.

6. *Same—Duty of Carriers—Cars.*—Carriers in the proper performance of their duties are required to provide suitable and adequate cars for the care and preservation of live stock during their carriage, or to afford proper facilities for having them watered and attended to, and to make proper provision for them in reference to peculiar traits or conditions of which they have notice, especially when the carrier makes stipulations in reference to such conditions. *Ibid.*

7. *Same—Evidence.*—A common carrier received a shipment of valuable horses, issuing therefor its usual live-stock bill of lading, confining recovery, in event of injury, to the inadequate maximum sum of $100 each, at the same time being informed of the character of the horses, and that there was a stallion among them which would injure the other animals if allowed to mingle with them; and in consequence undertook to box off the stallion to itself in the car with the others. There was evidence tending to show that the boxing-off of the stallion was a "sorry job," and being required by a connecting line of carriers to make it more secure, did so, but by mistake placed another horse therein, and put the stallion in with the other horses in the car, resulting in their injury: *Held*, evidence sufficient of the actionable negligence of the initial carrier, and the stipulation in the bill of lading restricting the amount of the recovery is therefore void. *Ibid.*

8. *Same—Arbitrary Value—Inadequacy—Public Policy.*—In order to sustain a provision in a railroad company's live-stock bill of lading limiting the amount of recovery to a certain sum per head, it must appear that there was an intent and *bona fide* effort on the part of the carrier and consignor to fix upon the value of the shipment, and it will not meet the requirement when the carrier has notice that the shipment contemplated was of high-priced horses, that the stipulated amount of recovery was grossly inadequate, and that the agent wrote in the stipulated valuation in an old form of bill of lading after asking the consignor if he should do so in order to give him a lower rate of freight. *Ibid.*

CARRIERS OF GOODS—*Continued.*

9. *Same—Contract Against Negligence—Waiver.*—A stipulation in a carrier's live-stock bill of lading which arbitrarily fixes a maximum valuation of the stock shipped and recoverable thereunder, without examination of the stock or any *bona fide* effort to arrive at their true value, is, to the extent that it is inadequate, a contract against the consequence of the negligent acts of the carrier, and invalid; and the acts of the consignor in making the shipment under a bill of lading of this character will not be construed as a waiver of the effect of the negligent acts of the carrier inflicting injury to the stock. *Ibid.*

10. *Carriers of Goods—Public Policy—Contract Against Negligence—Interstate Commerce Commission.*—A ruling of the Interstate Commerce Commission designed and intended simply as a regulation establishing a reasonable and proper freight rate for the shipment of live stock, without more, cannot affect the principle prevailing in this State, that the provision in a live-stock bill of lading which arbitrarily fixes the maximum amount recoverable is void as a contract on the carrier's part against its own negligence. *Ibid.*

11. *Carriers of Goods—Live-stock Bills of Lading—Void Stipulations—Lex Loci Contractus—Presumptions.*—The decisions in this State declaring void, under certain conditions, a stipulation in the live-stock bill of lading of a railroad as a contract against recovery for its negligent acts, are based upon the principles and policy of the common law, and where the contract of carriage is made in another State, these same principles are presumed as to the law of such other State, in the absence of evidence to the contrary. *Ibid.*

12. *Carriers of Goods—Failure to Furnish Cars—Interpretation of Statutes.*—No substantial error is found on appeal in this case for damages against the carrier for failing and refusing to furnish cars ordered by the plaintiff for the purpose of moving cordwood from a certain siding. *Wright v. R. R.*, 562.

CAUSA CAUSANS. See Evidence, 66.

CAUSAL CONNECTION. See Burden of Proof, 3.

CITIES AND TOWNS.

1. *Bond Issues—Legislative Authority—Municipal Authorities—Rate Taxed.*—An act of the Legislature authorizing a municipality to issue bonds for a water and sewerage system, allowing the boards of commissioners and of public works

CITIES AND TOWNS—*Continued.*

thereof to fix a rate of interest thereon of "not more than 6 per cent," when the bonds are issued, does not invalidate the issue because no rate of interest was fixed by the act. *Hotel Co. v. Red Springs*, 137.

2. *Cities and Towns — Highways — Streets — Abutting Owner— Negligence—Damages.*—As a rule, the abutting owner may not recover damages in his action against a municipality for diminution in the value of his property caused by a duly authorized change of grade in an established street, except when the work has been done in an unskillful or negligent manner, so as to proximately cause the damages claimed. *Earnhardt v. Commissioners*, 234.

3. *Cities and Towns — Streets — Evidence—Nonsuit—Statute of Limitations—Harmless Error.*—In this case damages are recoverable by plaintiff for diminution in the value of his property abutting on the street caused by the city's negligent construction in making authorized changes, and the error committed in the lower court in sustaining a nonsuit upon the evidence is adjudged harmless by reason of the statute of limitations having run against plaintiff's cause of action. *Ibid.*

4. *Cities and Towns — Streets — Negligence — Abutting Owner— Permanent Damages.*—The damages awarded in an action against a city to an abutting owner by reason of a faulty construction or work in changing the grade of a street by the proper officers of a city are permanent, and cover those which are past, present, and prospective. *Ibid.*

5. *Same — Statute of Limitations — Pleadings — Evidence.*—The statute of limitation of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred. *Ibid.*

6. *Cities and Towns—Ditches for Improvements—Sewerage and Water—Authority to Construct.*—An incorporated town or city has authority to dig ditches in its streets for the purpose of laying mains or pipes in the construction of a water or sewerage plant, or to let out work of this character to another under contract. *Bailey v. Winston*, 232.

7. *Cities and Towns — Streets and Sidewalks — Excavations — Guards and Lights—Negligence—Contributory Negligence— Evidence—Questions for Jury.*—In an action against a city

CITIES AND TOWNS—*Continued.*

or incorporated town for damages sustained by a pedestrian in falling, at night, into an open ditch made for the purpose of laying water or sewer pipes by the defendant's contractor, alleging negligence on defendant's part in not having it properly guarded, the question of defendant's negligence upon conflicting evidence is one for the jury. *Ibid.*

8. *Cities and Towns—Excavations—Dangerous Conditions—Pedestrians—Lights and Guards—Ordinary Care—Negligence.* It is the duty of a city or incorporated town to exercise ordinary care in guarding dangerous places in the streets, caused by ditches and excavations made in pursuance of its authority, with proper lights and barriers for the safety of pedestrians at night. *Ibid.*

9. *Cities and Towns—Streets and Highways—Dangerous Conditions — Reasonable Care — Supervision.* — A municipality owes it as an absolute duty to put its streets and highways in passable condition and to keep them so by the exercise of reasonable and continuing care and supervision for the safe use of pedestrians thereon. *Ibid.*

10. *Same—Defects—Notice, Express or Implied—Supervision.*—The ordinary liability of a municipality to a pedestrian injured by negligent defects in its streets or sidewalks depends upon whether the municipality had actual notice of the defect, or notice implied from the circumstances, as where the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision. *Ibid.*

11. *Cities and Towns—Streets and Highways—Dangerous Conditions—Positive Duty—Contractor—Negligence.*—The duty of a municipality to keep its streets and sidewalks in repair and free from dangerous pitfalls is a positive one, which it cannot delegate to others to perform so as to relieve itself from liability for nonperformance, or for negligence in the manner of doing the requisite work in the proper way. *Ibid.*

12. *Same—Wrongful Acts—Fixed Notice.*—The doctrine as to implied notice of a defect in a street or sidewalk, which causes an injury to a pedestrian, is not applicable when the very danger is created by the municipality itself or by some one under its direction, for then it is fixed with notice and liable for the damages proximately resulting from its negligence. *Ibid.*

CITIES AND TOWNS—*Continued.*

13. *Cities and Towns—Streets and Highways—Dangerous Conditions — Positive Duty—Contractor—Negligence—Liability of City.*—A city may not contract with another to make excavations in its streets or sidewalks, which it is authorized to do, and thereby escape liability for the negligent acts of its contractor, which cause an injury to a pedestrian. *Ibid.*

14. *Cities and Towns — Liability — Independent Contractor—Negligence—Streets and Sidewalks—Pedestrians.*—The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor. *Carrick v. Power Co.*, 378.

15. *Same—Liability of Independent Contractor.*—The same principle of liability as applied to a city's responsibility for the acts of its independent contractor concerning dangerous places negligently left on its streets and sidewalks applies to the city's contractor who sublets the work to an independent contractor—that is, when the work that is being done for their benefit or by their procurement is of the kind to create a nuisance unless special care is taken, they are charged with the duty of safeguarding it, and they may not relieve themselves by delegating this duty to others. *Ibid.*

16. *Same—Character of Work.*—One who has contracted with a city to do work upon its streets and sidewalks may not avoid liability upon the defense that the work was being done for him by an independent contractor, when the negligence complained of was leaving at night a hole 2 feet square at the opening and 4 or 5 feet deep on the edge of a sidewalk, extending partly in and leaving only a space of 3 to 5 feet for pedestrians to pass in going to or from their work along an unlighted street, without guard or signal lights of the danger. *Ibid.*

17. *Cities and Towns—Streets and Sidewalks—Danger to Pedestrians—Contributory Negligence.*—In this case the evidence tended to show that the plaintiff fell at night into a hole in the sidewalk negligently left unguarded and without signal lights of the danger, while returning from his work at night: *Held*, no evidence sufficient to be submitted to the jury upon the question of contributory negligence. *Neal v. Marion*, 126 N. C., 412, cited and distinguished. *Ibid.*

CITIES AND TOWNS—*Continued.*

18. *Cities and Towns—Condemnation—Special Acts—Requisites—General Laws—Interpretations of Statutes.*—An incorporated town was authorized to erect, own, and operate an electric plant under chapter 217, Private Laws of 1911, conferring the power of condemnation "in the same manner as is now provided by law for the condemnation of lands for streets." The charter of the town contains no method of procedure for condemning lands for streets: *Held*, that to lawfully authorize a municipal corporation to exercise the right of eminent domain the power must be expressly conferred or arise by necessary implication and the procedure necessary to give it effect must be provided; but a valid exercise of this power may be done by the municipality under the general law, ch. 86, sec. 1, Public Laws of 1911, where all requisite powers are conferred. *Eppley v. Bryson City*, 487.

19. *Cities and Towns — Police Powers—Billboards—Discretion—Courts.*—The courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Small v. Edenton*, 146 N. C., 527, overruling *S. v. Higgs*, 126 N. C., 1014, cited and approved. *S. v. Staples*, 637.

20. *Same—Ordinances—Conflagrations—Health.*—It is within the police powers of a municipality and a valid exercise of its discretionary power, to pass an ordinance, as a preventive against fires and in furtherance of the health of the town, requiring that "billboards or other similar structures used solely for the purpose of displaying posters or other public advertisements" shall not be nearer the ground than 24 inches, except where they are erected and maintained against a wall, and imposing a fine as a punishment for its violation. *S. v. Whitlock*, 149 N. C., 542, cited and distinguished. *Ibid.*

CLERK OF COURTS. See Liens, 3, 4; Courts.

COLLATERAL ATTACK. See Frauds and Mistakes, 8; Railroads, 22.

COLLECTIONS. See Principal and Agent, 8.

COLOR OF TITLE. See Deeds and Conveyances, 18, 19.

COMMISSIONS. See Executors and Administrators, 3, 7, 8; Taxation, 3, 4; Trusts and Trustees, 8, 9.

COMPENSATORY DAMAGES. See Measure of Damages, 1, 2, 3, 8.

CONDEMNATION. See Easements.

CONDITIONAL SALES. See Contracts, 17.

CONSENT. See Reference, 5.

CONSIDERATIONS. See Evidence, 62; Railroads, 8, 9; Contracts, 22, 39, 40, 46; Bills and Notes, 3.

CONSIGNOR AND CONSIGNEE. See Carriers of Goods, 1, 2, 3, 4.

CONSTITUTION OF NORTH CAROLINA.

Article I, sec. 14, does not apply to the power of the Legislature to impose penalties for the violation of a statutory offense. *S. v. Blake*, 608.

Article II, sec. 14. It does not require a roll-call bill, with "aye" and "no" vote, for the exercise by a county of the power of taxation, etc., when such power has previously been given. *Commissioners v. Commissioners*, 514.

Article IV, secs. 7 and 14. The Legislature may establish special counts and give them exclusive jurisdiction of misdemeanors committed within the corporate limits. *S. v. Doster*, 634.

CONSTITUTIONAL LAW.

1. *Bond Issues—Legislative Authority—Constitutional Law—Taxation.*—The requirement of the Constitution as to the calling and recording of the "aye" and "no" vote, having been met in all particulars relating to the issuance of bonds by the town of Red Springs for water and sewerage purposes, the validity of the issue can neither be successfully resisted nor the collection of taxes for the purpose restrained. *Hotel Co. v. Red Springs*, 137.

2. *Bond Issues—Legislative Authority—Necessaries—Vote of People.*—When it appears that a municipality, desiring to issue bonds for water and sewerage purposes, and a legislative enactment authorizing their issuance, have declared the purpose thereof to be a necessity, the validity of the bonds cannot be successfully attacked upon the ground that they were not duly authorized by a vote of the qualified voters of the town. *Ibid.*

3. *Bond Issues—Legislative Authority—Municipal Authorities—Rate Taxed.*—An act of the Legislature authorizing a municipality to issue bonds for a water and sewerage system, allowing the boards of commissioners and of public works thereof to fix a rate of interest thereon of "not more than 6 per cent,"

CONSTITUTIONAL LAW—*Continued.*

when the bonds are issued, does not invalidate the issue because no rate of interest was fixed by the act. *Ibid.*

4. *Bond Issues—Rate of Taxation—Sinking Fund—Constitutional Law.*—A bond issue of a town duly authorized by legislative enactment is not objectionable or invalid because at the present rate of taxation an insufficient revenue is obtained for a sinking fund to retire the bonds at maturity and to pay the interest thereon. *Lumberton v. Nuveen*, 144 N. C., 303, cited as controlling. *Ibid.*

5. *Bond Issues—Water and Sewerage—Division of Proceeds—Municipal Discretion.*—A legislative grant of authority to a town to issue bonds for the purpose of providing a necessary waterworks and a necessary sewerage system, is not invalid because it provides for these two purposes in one bond issue, leaving the division of the proceeds for each purpose to the discretion of the municipal authorities, where it can be more intelligently exercised. *Ibid.*

6. *Bond Issue—Sewerage and Water—Interpretation of Statutes.*—The act of 1911, Public Laws, ch. 86, does not affect the validity of the bonds of Red Springs referred to in this case. *Ibid.*

7. *Condemnation — Damages — Legislative Authority — Vested Rights—Constitutional Law.*—The Legislature has the constitutional authority to provide that the special benefits to be derived to the owner of lands over which a county constructs a public road shall be an offset against damages sustained by the owner in having his lands thus taken for public use; and this requirement can be changed by the Legislature at any time before the rights of the parties are settled and vested by verdict and judgment. *Phifer v. Commissioners*, 150.

8. *Process—Service—Nonresidents—Publication—Statutes — Constitutional Law.*—Revisal, sec. 1243, providing for personal service of summons on corporations "having property or doing business in this State," by leaving a true copy of the summons with the Secretary of State, is constitutional and valid. *Currie v. Mining Co.*, 209.

9. *Legislative Enactments—Constitutional Law—Interpretation—Courts.*—In passing upon the constitutionality of a legislative enactment it is the duty of the court to declare the law as expressed by the people in the Constitution, having respectful regard for the coördinate department of the Government in the Legislature, the agent of the people under their Constitution, resolving all reasonable doubts in favor of its acts. *In re Watson*, 340.

CONSTITUTIONAL LAW—*Continued.*

10. *Same—Minors—Reformatory—Parens Patriæ.*—The Legislature has no unlimited and arbitrary power over minors in respect to detaining them in reformatories, and enactments relating thereto are justified only upon the idea that the child is without parental care, and that his environments are such that he may reach manhood without restraint or training under corrupting influences, unless the State, as *parens patriæ*, performs the duty which devolves primarily upon the parent. *Ibid.*

11. *Same—Vagrants.*—The Legislature has constitutional authority to establish reformatories, "where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed," and therein youthful criminals may be detained and reformed before they become hardened in crime; and the legislative power in this respect exists, in the absence of a prohibition in the Constitution, though not expressly given. *Ibid.*

12. *Same—Bill of Rights.*—The punishment for vagrancy cannot exceed thirty days under our statute, and a legislative act which provides for a longer detention of a child in a reformatory for that offense, if merely for the purpose of punishment, would be violative of section 14 of the Bill of Rights. *Ibid.*

13. *Constitutional Law—Vagrants—Minors—Reformatory—Trial by Jury—Due Process.*—The constitutional right of trial by jury does not extend to an investigation into the status and needs of a child upon the question as to whether he should be sent to a reformatory for his own good as well as the good of the community in the interest of good citizenship, nor does the restraint therein put upon the child amount to a deprivation of his liberty without due process of law, within the meaning of the declaration of the Bill of Rights, nor is it a punishment for crime. *Ibid.*

14. *Counties—Legislative Discretion—Taxation—Original Power—Roll-call Bills—Aye and No Vote—Constitutional Law.*—The power to exercise ordinary governmental functions, collecting taxes and the like, having been conferred originally on a county, it is not required that an act which adds territory to that county by taking it from an adjoining county, be a roll-call bill passed on separate days upon an "aye" and "no" vote, in compliance with section 14, Article II of the Constitution, for the county to exercise the right of taxation over the territory annexed, for such power already existed by virtue of the prior act of its creation; and the questions of

CONSTITUTIONAL LAW—*Continued.*

contracting debts and the levy and collection of taxes to pay them are properly referable to the statutes, general or special, controlling in such matters. *Commissioners v. Commissioners*, 514.

15. *Federal Constitution—"Full Faith and Credit"—Judgments—Divorce.*—The courts of this State will give full faith and credit under the Federal Constitution to a decree of divorce rendered in another State as regards its own citizens. *In re Alderman*, 507.

16. *Parent and Child—Property—Vested Rights—Divorce—Judgment—Extraterritorial Jurisdiction.*—A child is not regarded as the property of the parent so as to give him a vested right in the child or its services under a decree of divorce, and the decree in this respect has no extraterritorial effect beyond the boundaries of the State where it was rendered. *Ibid.*

17. *Same—Habeas Corpus—Custody of Child.*—After a decree of divorce in another State awarding the care of the child of the marriage to the mother, the mother and child became citizens and residents of North Carolina, and while so residing the father brought proceedings here in *habeas corpus* for the custody of the child, which was denied. The father then contended that according to the decree of divorcement he was entitled to visit the child, etc.: *Held*, the decree relied upon was not subject to this interpretation; but, if otherwise, it would not have extraterritorial effect, under the full faith and credit clause of the Federal Constitution, beyond the State wherein it was rendered, so as to affect the inherent power of this State in awarding the custody of the child, which had become domiciled here. *Ibid.*

18. *Statute—Police Powers — Local Application — Constitutional Law.*—Public-local acts, passed by the Legislature, in the exercise of police power, which apply only to police regulation, are valid. *S. v. Blake*, 608.

19. *Same — Game Laws — Quail — Closed Season—Bird Dogs at Large.*—A statute enacted to protect the game birds of a certain county is a valid exercise of the police powers of the State, within the discretion of the Legislature, and hence there is no constitutional objection to an act which makes it "unlawful for any one to permit his or her setter or pointer dog to run at large during the closed season for quail," applying to a designated county alone. *Ibid.*

20. *Constitutional Law — Government — Coördinate Branches — Powers—Legislature.*—Under the State's Constitution the

CONSTITUTIONAL LAW—*Continued.*

executive and judicial departments are grants of power, but the Legislature exercises all power which is not forbidden by the Constitution. *Ibid.*

21. *Constitutional Law—Statutes—Game Laws—Closed Season—Dogs at Large—Cruel and Unusual Punishments.*—A statute which makes it unlawful for the owners of bird dogs to permit them to run at large during the closed season for quail in a certain county, making the offense punishable by fine or imprisonment, is not objectionable on the ground that our Constitution forbids "cruel and unusual punishment." *Ibid.*

22. *Constitutional Law—Statutes—Punishment—Legislative Discretion—Judiciary—Excessive Punishment.*—Section 14, Article I of our State Constitution restricts the judiciary from imposing excessive punishment where the Legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. *Ibid.*

23. *Recorder's Courts—Jurisdiction Exclusive—Legislative Powers — Corporate Limits — Constitutional Law.* — Section 27, Article IV of the State Constitution, as modified by section 14 of the same article, authorizes and empowers the Legislature to establish special courts in cities and towns and gives them exclusive jurisdiction of misdemeanors committed within the corporate limits. *S. v. Doster*, 634.

24. *Same.*—An act creating a recorder's court for an incorporated town, conferring exclusive jurisdiction over offenses cognizable in courts of a justice of the peace, is void in so far as it seeks to extend the jurisdiction and make the same exclusive as to such offenses committed in the township beyond the corporate limits of the town. *Ibid.*

25. *Usury — Furniture — Misdemeanor — Debtor and Creditors—Classification—Constitutional Law.*—Our Legislature has the power under its police regulations to make the taking of usury on household and kitchen furniture a criminal offense, and the right of classification, in the enforcement of proper police regulations on this subject, is referred, very largely, to the legislative discretion. *S. v. Davis*, 648.

26. *Same.*—Revisal, sec. 3712 (a), which makes it a misdemeanor for "any person, firm, or corporation" to loan money "by note, chattel mortgage, conditional sale, or otherwise, upon any article of household or kitchen furniture," at a greater rate of interest "than 6 per cent before or after such interest shall accrue, etc.," is a classification on a reasonable

CONSTITUTIONAL LAW—*Continued.*

ground, and not an arbitrary selection, and therefore not objectionable as an unlawful division of money-lenders into two classes within the intent and meaning of the fourteenth amendment of the Federal Constitution. *Ibid.*

27. *Same — Interpretation of Statutes — Usury Charged or Reserved.*—It was proven that the defendant, indicted under Revisal, sec. 3712 (a), made a loan of $10, taking a note for $16.75, secured by a mortgage on household and kitchen furniture, worth at least $25: *Held*, under the language of our statute, the charge of the usurious interest constituted the offense without the necessity of having received it; and under the facts of this case an usurious rate of interest for the period of the loan, to wit, $1.75, was actually reserved. *Ibid.*

CONTRACTS. See Bills and Notes; Insurance; Parent and Child, 3, 4.

1. *Pleadings—Contracts—Evidence.*—In an action brought upon contract, evidence relating to a second contract which was not pleaded is incompetent. *Jeffords v. Waterworks Co.*, 10.

2. *Contracts—Written—Fraud—Parol Evidence—Conversation.*—Without allegation of fraud or misrepresentation, conversations preceding the execution of a written contract are incompetent to vary, alter, or contradict its terms. *Ibid.*

3. *Evidence—Contracts—Use of Improper Machinery—Former Use.*—When the defense in an action to recover upon a contract to bore an artesian well, alleging that the defendant wrongfully stopped the plaintiff from boring it, is that the plaintiff was not using proper machinery and equipment, evidence as to the insufficiency of a machine formerly used is incompetent. *Ibid.*

4. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Written Contract—Parol Evidence.*—The word "benefits" as ordinarily used in the regulations of a railroad company's relief department does not include hospital treatment and medical attention; and as it is the acceptance by a member of that department of the benefits thereunder which may, in proper cases, bar his recovery for damages for a personal injury negligently inflicted by the company, and as the act of acceptance, when in dispute, is not included in any part of the written contract embraced in the regulations, it may be shown or disproved by parol evidence of the circumstances connected with it. *Wacksmuth v. R. R.*, 34.

CONTRACTS—*Continued.*

5. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Contracts—Evidence.*—When in defense to an action for damages for personal injuries inflicted upon an employee, a railroad company relies upon the acceptance of benefits by the employee as a member of its relief department as a bar under the rules and regulations of the department, it is competent for the plaintiff, as tending to avoid the bar, to show that he had accepted the benefits under the assurance of the defendant that it would do certain things in regard to keeping him as an employee, etc., which it had failed to do, and that, relying on this promise, he had accepted the benefits; and evidence in this case *Held* sufficient to sustain a verdict in plaintiff's favor on the issue as to whether the plaintiff, after his injury, voluntarily accepted the benefits under his contract. *Ibid.*

6. *Railroads—Relief Department—Members—Privity of Contract.*—There is privity of contract between a railroad company having a relief department for which it furnishes facilities and operating expenses and an employee, a paying member of that department, and a contract may be sustained, upon a valuable consideration shown, that the employee, in proper instances, may not receive the benefits of the department and then sue for damages for a personal injury alleged to have been received owing to the defendant's negligence. *King v. R. R.*, 44.

7. *Contracts—Agreeing Mind—Requisites.*—While it is necessary to a valid contract that the parties assent to the same thing in the same sense, the assent may be given by the agent of a party having either express or implied authority to do so. *Trollinger v. Fleer*, 81.

8. *Contracts—Principal and Agent — Confirmation — Subsequent Ratification—Authority, Express or Implied.*—When one person holds another out as his agent and thereby induces others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so; or, if he ratifies what he did, it is the same, in effect, as if he had in the beginning actually and expressly conferred the requisite authority. *Ibid.*

9. *Same—General Charge—Evidence—Questions for Jury.*—The defendant, having made by letter a definite proposition to the plaintiff to work on his farm, requested an acceptance of the proposition by telegram, with which the plaintiff complied.

CONTRACTS—*Continued.*

The plaintiff then went to the defendant's farm, and his employment was accepted in accordance with the terms of the proposition by one who was in possession, assuming full control and management for the defendant; and there was evidence of ratification by the defendant at a subsequent time when he visited his farm: *Held*, (1) the question of plaintiff's employment under the contract did not depend solely upon whether the defendant received the telegraphic reply to his written proposition, but also upon whether it was consummated by the acts of the defendant's agent; (2) the recognition by the defendant of this agency, with full knowledge of the facts, was a ratification of the agent's prior acts, and his assent to what the agent had done was equivalent to prior authority given; (3) evidence that the defendant placed the agent in general charge of his farm, with apparent right to make contracts of employment, is competent to be considered by the jury upon the question whether an agency of the character claimed existed or not. *Ibid.*

10. *Insurance—Credit Bonds—Contracts—Evidence.*—In this action brought upon a contract to indemnify against loss by giving credit, the application bond, and Schedule A, to which the bond refers, are construed as a contract of insurance between the parties. *Grocery Co. v. Casualty Co.*, 116.

11. *Insurance—Credit Bond—Contracts—Construction—Intent.*—A contract indemnifying a merchant against a credit loss should be construed more strongly against the insurer, and ambiguities should be reconciled, if possible, by gathering the intent of the parties from the whole instrument; and if the particular clause requiring interpretation cannot be thus brought into harmony with the rest of the contract touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured. *Ibid.*

12. *Same—Ambiguity—Void Provisions.*—When in an application by a merchant for a bond of indemnity for credit losses it is provided, "Experience shall be the basis for credit under the bond as specified on Schedule A," with a specified account limit, and it is expressly stipulated in the bond that Schedule A shall describe the class of customers to be covered by the bond, which specifies three classes of debtors, which may be termed old customers, new customers, and those who are solvent, the fact that nothing is said in this schedule about insolvency at the time of the execution of the bond, when defining old and new customers, and that it is expressly provided that as to "outstandings" only those of the debtors

CONTRACTS—*Continued.*

who were solvent when the bond was executed were insured, indicates clearly the intent to insure the debts of old and new customers, created after the execution of the bond, although insolvent, provided the credit extended was based upon the experience of the insured; and an ambiguity in a different section of the bond, which is repugnant to the intent gathered from the whole instrument, that experience is to be the basis of credit extended, is void. *Ibid.*

13. *Insurance—Credit Bond—Intent—Construction.*—An application for a bond of indemnity by a merchant for credit losses provided that credits covered by the bond were to be extended to customers upon the basis of experience, with limitation as to amount, etc., as contained in Schedule A of the bond accordingly issued. Paragraph 12, subsection B, of the bond, provided that it covered "the insolvency, etc., in this subsection" occurring between the date of the execution and termination of the bond. When construed in connection with the other parts of the bond under consideration in this case: *Held*, that experience being the basis of credit and that the debts insured are those covered by Schedule A, the intent of subsection B of paragraph 12 was to provide evidences of liability that would be satisfactory for small claims that did not exceed $150, which were divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond. *Ibid.*

14. *Contracts — Independent Contractor—Negligence—Supervision —Right to Terminate.*—A responsible party who has contracted to complete a work in its entirety, in this case a mill, is an independent contractor and solely liable as such for damages for personal injuries to an employee working upon its construction; and the fact that the contract with the owner provides for the inspection of the work by the engineer of the latter to ascertain that it comes up to the plans and specifications he has furnished therefor, with clauses of forfeiture under the contract if it does not; and that the engineer may require the contractor under like conditions to put on an extra force to complete the work, if in his judgment it is necessary to do so to bring it within the time agreed upon, do not alter the relationship of independent contractor so as to make the owner liable for damages for his negligence. *Denny v. Burlington*, 155 N. C., 33, cited as controlling. *Hopper v. Ordway*, 125.

CONTRACTS—*Continued.*

15. *Same — Interpretation of Contract — Conclusiveness.*—When there is no right to put an end to a contract to construct a piece of work, in this case a mill, which was to have been done in its entirety by the contractor, but merely the right on the part of the owner to terminate it in the event the contractor should not perform it according to its reasonable stipulations under the inspection of the engineer of the former, there is no application of the doctrine that "When the employer may at any time terminate the employment, though strong evidence that the employee is a mere servant, it is not conclusive." *Ibid.*

16. *Parties — Contracts — Assignment—Persons Interested—Interpretation of Statutes.*—The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence that he has assigned the contract to a third person, not a party to the action, and has no further interest therein. Revisal, sec. 400. *Vaughan v. Moseley,* 156.

17. *Liens—Conditional Sale—Reservation of Title—Realty—Registration.*—Goods sold under a contract reserving title in the vendor, which are attached to the realty, become realty except as between the parties, but not as against others who have acquired a lien for labor and material before the registration of the conditional sale. *Fulp v. Power Co.,* 157.

18. *Statute of Frauds—Contract to Convey Lands—Memoranda—Lawfully Authorized Agent.*—A memorandum of a contract to convey land, written at the request of the contracting parties and in their presence, sufficiently stating the terms and conditions of sale, designating the lands sold, with the names of the parties appearing therein, is sufficient to make a valid contract under the statute of frauds. *Wellman v. Horn,* 170.

19. *Same—Signing—Name in Memoranda.*—It is not necessary that a contract to convey lands be subscribed by the party to be bound thereby, and the requirements of the statute of frauds are met if his duly authorized agent write his name within a sufficient memorandum of the agreement. *Ibid.*

20. *Statute of Frauds—Contract to Convey Lands—Lawfully Authorized Agent—Parol Authority.*—The authority of a duly authorized agent of a party to be bound by a contract to convey lands need not be in writing under the statute of frauds. *Ibid.*

CONTRACTS—*Continued.*

21. *Same—Description—Signing—Name in Memorandum.*—A, having agreed to sell his home place to B, the parties requested C to witness the terms and conditions of the sale, and B having given A his note in part payment of the purchase money, C, in the presence of A and B, wrote the following memorandum of sale: "$5,000 January 2, 1911; $5.000 January 2, 1912. B to pay the above to A when he makes deed to A for B's home place, 3 October, 1910." C read this memorandum over to A and B, and they said it was correct. B resisted suit to recover the purchase price on the ground of the statute of frauds: *Held,* C was the lawfully authorized agent of A to write the contract, within the meaning of the statute of frauds; the property contracted for was sufficiently described; the writing of A's name in the memorandum was a sufficient signing, and the contract is a valid one. *Ibid.*

22. *Corporations, Insolvent—Factors—Contracts—Consideration—Preferred Stock—Debtor and Creditor—Distribution.*—An agreement entered into by a manufacturing corporation and a factor provided that the latter should take a certain amount of preferred stock in the former, and so long as he held the stock he should sell at a certain commission the product of the corporation, the stock to be taken up by the corporation if the account was changed. By mutual consent this agreement was transferred by the factor to the plaintiff along with the preferred stock, and the corporation having become insolvent, the plaintiff seeks as a creditor a priority of payment of his stock to the other preferred stock issued by the corporation, there being insufficient funds after the payment of debts to pay this stock in full: *Held,* (1) the contract did not contemplate the insolvency of the corporation, and hence the question as to whether the corporation could thus retire its stock did not arise; (2) the plaintiff was not to be regarded as a creditor. He was entitled only to his pro rata part in the distribution of the funds with the other holders of the preferred stock. *Farrish v. Cotton Mills,* 188.

23. *Railroads—Relief Departments—Contract—Rules and Regulations—Decisions of Department—Collateral Attack—Fraud.* The decision of the advisory board of a railroad company's relief department rendered on appeal to it by its member from the decision of the superintendent that he had sufficiently recovered of a sickness, not claimed through negligent act of the defendant, to resume work and cause the cessation of the benefits he had been receiving, cannot be

CONTRACTS—*Continued.*

collaterally attacked in an action brought in the courts, when rendered in good faith and in the absence of oppression or fraud. *Nelson v. R. R.*, 194.

24. *Contract Against Negligence — Waiver.*— A stipulation in a carrier's live-stock bill of lading which arbitrarily fixes a maximum valuation of the stock shipped and recoverable thereunder, without examination of the stock or any *bona fide* effort to arrive at their value, is, to the extent that it is inadequate, a contract against the consequence of the negligent acts of the carrier, and invalid; and the acts of the consignor in making the shipment under a bill of lading of this character will not be construed as a waiver of the effect of the negligent acts of the carrier inflicting injury to the stock. *Harden v. R. R.*, 238.

25. *Carriers of Goods—Public Policy—Contract Against Negligence—Interstate Commerce Commission.*—A ruling of the Interstate Commerce Commission designed and intended simply as a regulation establishing a reasonable and proper freight rate for the shipment of live stock, without more, cannot affect the principle prevailing in this State, that the provision in a live-stock bill of lading which arbitrarily fixes the maximum amount recoverable is void as a contract on the carrier's part against its own negligence. *Ibid.*

26. *Contracts, Written — Intent — Conflicting Terms—Interpretation.*—Terms of a written contract will not be construed as conflicting so as to eliminate some of them subsequently expressed as conflicting with the others, when from the intent of the parties, as gathered from the entire instrument, they can reasonably be reconciled and construed together. *Refining Co. v. Construction Co.*, 277.

27. *Same—Goods Sold and Delivered—F. O. B. Destination—Liability for Carrier's Delay.*—In an action to recover the price of goods sold and delivered, the defendant set up a counterclaim for failure of the plaintiff to deliver them in a certain time in accordance with the terms of a written contract, specifying delivery f. o. b. at defendant's plant in C. at a certain price, and stipulating that the liability of plaintiff ceased when shipment was delivered by it to the common carrier: *Held*, the provision that the plaintiff's liability should cease upon the delivery to the carrier was not irreconcilable with the agreement that delivery should be f. o. b. at defendant's plant at C. at a certain price, it appearing by construction of the entire contract of sale that it was the intent of the parties that the plaintiff would not be responsi-

CONTRACTS—*Continued.*

sible for the delay in delivery by the carrier, and that no title to the goods would pass to the defendant and no charge therefor could be made by the plaintiff until the delivery at the specified point had been made. *Ibid.*

28. *Tenants in Common—Contracts to Convey—Deeds and Conveyances.*—In special proceedings for partition of lands by tenants in common, left them under the will of their father as remaindermen after the life estate of their mother, one of them set up a parol contract alleged to have been made by the others, to convey the lands upon consideration of his having moved upon the lands and taken care of the mother during her lifetime, and the issue thus raised was transferred to the civil-issue docket, and an order of reference made, whereupon it was found that no such contract was made, and it was so adjudged, and judgment duly entered, that the claimant account for the rents and profits for the time he was in possession cultivating the land, and that he recover a certain sum of money, which was the difference between this and the value of the improvements he had put upon the lands: *Held,* the tenant setting up the contract was estopped by the former judgment from suing to recover damages for breach of the alleged contract to convey the lands, and to condemn and apply the proceeds of a sale thereof to satisfaction of such damages; for while it may not have been necessary in the former action for the plaintiff in this one to have alleged the contract in order to recover for permanent improvements, it was included in the scope of the former inquiry and concluded by the judgment therein. *Coltrane v. Loughlin,* 282.

29. *Contracts—Express Terms—Local Custom—Evidence.*—An ordinary express contract which is definite, specific, and plain of meaning may not, as a rule, be changed or varied by evidence of local custom or usage. *Bowman v. Blankenship,* 376.

30. *Same—Conflicting Evidence—Contracts in General Terms.*—Plaintiff sued for balance claimed to be due him by defendant for sawing lumber of the latter, and introduced evidence tending to prove that he had complied with his contract, which required that he was to saw it in a manner suitable for market and was to "edge it square so as to save loss at the mills." The defendant contended that he did not owe the amount sued for, and offered evidence tending to show that the plaintiff was to square it up and cut it for the shops, which defendant said he knew how to do and had

CONTRACTS—*Continued.*

the proper machinery for the purpose, but which he did not do: *Held,* in this case, that testimony tending to show that the lumber cut was "as good as any mill commonly cuts" was competent, in view of the conflicting evidence of what the contract really was, the plaintiff's testimony tending to establish an agreement in terms sufficiently general and indefinite to make the evidence admissible. *Ibid.*

31. *Cities and Towns—Liability—Independent Contractor—Negligence—Streets and Sidewalks—Pedestrians.*—The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor. *Carrick v. Power Co.*, 378.

32. *Same—Liability of Independent Contractor.*—The same principle of liability as applied to a city's responsibility for the acts of its independent contractor concerning dangerous places negligently left on its streets and sidewalks applies to the city's contractor who sublets the work to an independent contractor—that is, when the work that is being done for their benefit or by their procurement is of the kind to create a nuisance unless special care is taken, they are charged with the duty of safeguarding it, and they may not relieve themselves by delegating this duty to others. *Ibid.*

33. *Same—Character of Work.*—One who has contracted with a city to do work upon its streets and sidewalks may not avoid liability upon the defense that the work was being done for him by an independent contractor, when the negligence complained of was leaving at night a hole 2 feet square at the opening and 4 or 5 feet deep on the edge of a sidewalk, extending partly in and leaving only a space of 3 to 5 feet for pedestrians to pass in going to or from their work along an unlighted street, without guard or signal lights of the danger. *Ibid.*

34. *Contracts—Independent Contractor—Negligence—Supervision.* When a contractor has undertaken to do a piece of work according to plans and specifications furnished and under an agreement for its completion such as otherwise to make him an independent contractor for whose negligent acts the owner or proprietor is not responsible, this relationship is not nec-

CONTRACTS—*Continued.*

essarily affected or changed because the right is reserved for the engineer, architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that it is done pursuant to the terms of the contract. *Johnson v. R. R.*, 382.

35. *Contracts — Independent Contractor — Negligence—Collateral Employment—Respondeat Superior.*—The owner or proprietor of work to be done by an independent contractor cannot escape liability upon the ground that an injury was inflicted by the act of an independent contractor, when the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not acting *bona fide* under the terms of the contract, but was, in fact, only the agent of the owner or proprietor in the work that plaintiff was engaged in doing. *Young v. Lumber Co.*, 147 N. C., 26, cited and applied. *Ibid.*

36. *Contracts—Independent Contractor—Dangerous Work—Owner's Liability—Respondeat Superior.*—The owner or proprietor of work necessarily and inherently dangerous in its performance, as in this case blasting rock in the corporate limits of a town near the homes of the plaintiff and several others, and which to the knowledge of the defendant had caused rocks to be thrown upon plaintiff's dwelling and rocks and dirt upon his premises, with loud explosions and great force, cannot, by contract with another creating the relationship of independent contractor, escape liability from the damaging consequences of the work done thereunder. *Hunter v. R. R.*, 152 N. C., 688, cited and applied. *Arthur v. Henry*, 393.

37. *Statute of Frauds—Contracts to Convey Lands—Memorandum—Writing Sufficient.*—A memorandum held a sufficient contract to convey lands under the statute of frauds, reading as follows: "Received of B $5 to confirm the bargain on the purchase of the farm on which I now live," dated and signed by the vendor. *Bateman v. Hopkins*, 470.

38. *Statute of Frauds—Contracts to Convey Lands—Description—Identification of Lands.*—A description of lands, the subject-matter of a contract to convey, as "the farm on which I now live": *Held*, to be sufficiently defined to enforce specific performance upon the identification of the *locus in quo*. *Ibid.*

39. *Same—Consideration—Parol Evidence.*—The consideration for the lands contracted to be conveyed need not be expressed in the written memorandum or contract required by the statute of frauds, and may be shown by oral evidence. *Ibid.*

CONTRACTS—*Continued.*

40. *Statute of Frauds—Contract to Convey Lands—Vendor and Vendee—Consideration.*—In an action by the vendee against the vendor for specific performance of a contract to convey lands, it is not necessary that the written memorandum required by the statute of frauds set forth the obligation of the vendee to pay the purchase price, for by bringing his action the vendee agrees to perform the contract irrespective of the statute of frauds. It is only necessary that the memorandum be signed by the party to be charged, who is the defendant in this case. *Ibid.*

41. *Statute of Frauds—Contracts to Convey Lands—Specific Performance — Purchase Money — Tender — "Ready, Able, and Willing."*—In an action to enforce against a vendor specific performance of his contract to convey lands, which he seeks to avoid upon the ground that it is unenforcible under the statute of frauds, it is not required, to maintain the action, that the plaintiff show a tender of the purchase price before commencing his action or for him to pay it into court; for it is sufficient if he has ever been ready, able, and willing to comply, on his part, with the terms and conditions which the contract imposes on him. *Ibid.*

42. *Same—Reasonable Time Decreed.*—When specific performance of a contract is enforcible against the vendor of lands in the suit of the vendee, equity, looking to the adjustment of the rights of the parties, may decree that the plaintiff pay the purchase money into the court and otherwise comply with his contract, within a reasonable time, to be fixed by the court, and upon his failure to do so, his right to specific performance be denied and the action dismissed, and that if he does perform, on or before the last day named, the defendant execute a good and sufficient deed for the premises, properly acknowledged or proven, and deposit it with the clerk of the court, at a time to be named, to be delivered to the plaintiff, and when this is done, the money so deposited in court to be paid to the defendant. *Ibid.*

43. *Same — Appeal and Error — Notification in Decree—Costs.*—When the trial court decrees that the vendor of lands make deed to the vendee and file it with the clerk of the court, and that the vendee pay into court the purchase money, without fixing a time in which it is to be done, in an action for specific performance of a contract this Court will direct, when it appears that it should be done, that the order be modified by the lower court so that such reasonable time be specified. *Ibid.*

CONTRACTS—*Continued.*

44. *Executors and Administrators—Final Account and Settlement—Personal Liability—Wagering Contracts—Burden of Proof—Interpretation of Statutes.*—A petition by an administrator for a final account and settlement was resisted by the heirs at law and distributees, and the matter referred. In their answer, the defendants alleged that certain notes, valid on their face, were given for a gambling contract in cotton futures, and should not have been paid: *Held*, the provisions of Revisal, sec. 1691, do not apply so as to place the burden of proof on the administrator to show that the notes were given for a valid contract requiring the actual delivery of the cotton; and an exception by the defendant to the report of the referee in holding the payment of the notes a valid disbursement will not be sustained in the absence of any findings as to the nature of the contract for which they were given. *Overman v. Lanier*, 544.

45. *Pleadings — Counterclaim — Principal and Agent—Contract—Subject-matter.*—In an action relating to dealings between a principal and his sales agent, a counterclaim is properly set up when its subject-matter grew out of and related to the dealings between the parties or the contract of employment. *Church v. Dawson*, 566.

46. *Contracts, Written — Collateral Agreement —Consideration—Nudum Pactum.*—The plaintiff sued under a written contract made with defendant by which the defendant was to skid logs on double-deck skids, along the skidway over a tram, without stipulation in regard to the time when the logs were to be taken off the skids by the plaintiff. The defendant alleged damages arising independent of the contract, for plaintiff's failure, under a collateral agreement, to remove the logs from the skidway at his mills, thereby causing damages to defendant. In this case a charge was held correct that as there was nothing in the written contract sued on in regard to the time the plaintiff was to remove the logs, the issue as to defendant's damages in reskidding the logs should be answered in plaintiff's favor. *Lumber Co. v. Moffitt*, 568.

47. *Judicial Sales — Trustees — Commissions—Agreement—Subsequent Agreement—Interpretation of Contracts.*—In this case, *Held*, that a trustee of the funds arising from the sale of certain lands under judicial proceedings should not be entitled to certain commissions under an agreement entered into with the parties in interest, for the reason that these com-

CONTRACTS—*Continued.*

missions were included under a certain other and subsequent agreement in a larger sum for his full services. *Henry v. Hilliard*, 572.

48. *Judicial Sales — Trustees—Commissions—Agreement—Report —Interpretation of Contracts.*—An agreement entered into by the parties and a trustee appointed by the court to hold and disburse the proceeds of sale of lands under judicial proceedings, which specifies that the report of the trustee "is considered as correct as to all debts and credits that have passed through his hands, except as modified by this agreement," does not authorize a commission claimed by the trustee in his report which the agreement itself includes in a larger amount for full commissions which are to be paid him. *Ibid.*

CONTRACTS, BREACH OF. See Measure of Damages, 3, 4; Deeds and Conveyances, 22.

CONTRIBUTORY NEGLIGENCE. See Negligence.

1. *Master and Servant—Safe Place to Work—Immediate Injury —Contributory Negligence.*—Upon conflicting evidence as to whether the plaintiff, an employee, was negligently injured in defendant's machine shop, by a brass chip flying from a boring mill being operated near where he was working, without protecting him with a shield customarily used for the purpose, it is competent for the plaintiff to show, upon the question of his contributory negligence, that the boring mill was not in operation when he commenced to work, that the chip entered his eye almost instantly, and that he would have completed his work there within one and a half minutes, as relevant upon the question as to whether he should have taken greater precautions for his safety if he had been required to stay there longer in the position he necessarily assumed. *Pritchett v. R. R.*, 88.

2. *Master and Servant—Contributory Negligence—Declarations of Master — Haste — Unaccustomed Work—Evidence.*—The plaintiff was an employee of the defendant in its machine shop, and there was evidence tending to show that he was injured in the eye by a flying brass chip from a boring mill operated near, without the customary guard for his protection, just after he had been ordered there by defendant's foreman: *Held*, evidence is competent, on the question of contributory negligence, tending to show that the defendant's foreman told the plaintiff shortly prior to the injury

CONTRIBUTORY NEGLIGENCE—*Continued.*

that they were behind on that particular piece of work and he wanted him to assist on the job in the place of the regular man, who was sick. *Ibid.*

3. *Master and Servant—Duty of Master—Delegated Duty—Contributory Negligence —Assumption of Risks.*—In an action for damages brought against the employer for failure to provide for the plaintiff, an employee, a safe place to work, it is proper for the jury to consider the knowledge or familiarity of the employee with the conditions and surrounding circumstances of his work, on the issue of contributory negligence; and as it is an absolute duty the employer owes to provide for his employee a safe place to work, which he cannot delegate, and as the employee accepts only such risks as are ordinary to the employment, the doctrine of assumption of risks has no application. *Ibid.*

4. *Contributory Negligence — Burden of Proof.* — In an action for damages for the alleged negligent killing of plaintiff's intestate while at work at defendant's rip-saw, by reason of improper machinery and appliances furnished by the defendant for the work, causing the death by a plank hurled from a running belt, the defense of contributory negligence was set up in bar, that the intestate was sawing, at the time of the injury, a board on the table, and before the board had gone through the saw he put another board in and negligently and carelessly sawed the second board and shoved it so that the first board caught in the saw and was thrown back, striking him on the head and causing his death, and against this the intestate had been warned: *Held*, an instruction to the jury was correct which, in effect, charged if they should find from the greater weight of the evidence that the intestate was injured in this manner, the plaintiff could not recover. *Walker v. Manufacturing Co.*, 131.

5. *Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Assumption of Risks.*—In an action for damages for the wrongful killing of plaintiff's intestate while at work at defendant's rip-saw, there was evidence tending to show that it was done by a plank falling upon and being thrown from an unguarded belt operating the saw, and that the machinery was old and obsolete: *Held*, a charge was correct, upon the application of the doctrine of assumption of risks, that if the jury find from the greater weight of the evidence that the conditions were such that only a reckless man would have continued to work thereunder, and the probabilities of being injured were greater

CONTRIBUTORY NEGLIGENCE—*Continued.*

than the probabilities of safety, the jury should answer the pertinent issue in the affirmative, in defendant's favor, for upon the facts in this case it could not be assumed as a matter of law. *Ibid.*

6. *Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.*—When a plaintiff has sued in the State court and has pleaded and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act. *Horton v. R. R.*, 146.

7. *Cities and Towns — Streets and Sidewalks — Excavations — Guards and Lights—Negligence—Contributory Negligence—Evidence—Questions for Jury.*—In an action against a city or incorporated town for damages sustained by a pedestrian in falling, at night, into an open ditch made for the purpose of laying water or sewer pipes by the defendant's contractor, alleging negligence on defendant's part in not having it properly guarded, the question of defendant's negligence upon conflicting evidence is one for the jury. *Bailey v. Winston*, 252.

8. *Railroads—Negligence—Personal Injury—Light or Warnings —Contributory Negligence — Evidence — Nonsuit.*—Evidence tending to show that plaintiff was injured on a dark and cold night with a strong wind blowing, as he was walking along a path by the railroad track, about 2 feet from the end of the cross-ties, by being struck by defendant's switch engine running backward without lights or other warnings of its approach, is sufficient upon the question of defendant's negligence, and while it may be possible in this case that the plaintiff was himself negligent in walking too near the track or attempting to cross it without looking and listening, contributory negligence cannot be inferred as a matter of law, and a motion to nonsuit upon the evidence should not be sustained. *Hammett v. R. R.*, 322.

9. *Railroads—Permission to Use Track—Collision—Time Limit—Negligence—Contributory Negligence—Last Clear Chance—Issues—Evidence—Questions for Jury.*—The plaintiff railroad company applied to the defendant railroad company, a connecting line, for permission to go upon its main line to back cars upon a siding to be taken by the latter's train, and at first was refused permission on account of the schedule time of defendant's train, but later, on being informed

CONTRIBUTORY NEGLIGENCE—*Continued.*

this train was late, was given ten minutes within which to place said cars. While the plaintiff's train was on the defendant's main line preparing to back the cars into position, it was run into and damaged by one of defendant's trains where the track was straight for a mile and free from obstacles to the view. There was conflicting evidence as to whether the collision took place within or after the ten minutes of the permission: *Held*, a question for the jury: (1) if the collision occurred within the ten minutes allowed, the issue as to defendant's negligence should be answered in plaintiff's favor; (2) the plaintiff's contributory negligence would depend upon its negligent failure to get its train out of the way in the time limited under the rules of law properly applicable, to be determined on the entire facts relevant to the inquiry, including the fact that it was there by permit from defendant company, and with the purpose at the time of the impact of backing its train upon a siding; (3) if the collision occurred after the ten minutes permit it would amount as a conclusion of law to contributory negligence, under the duties imposed upon the plaintiff under the circumstances, continuing to the time of the impact; (4) the findings upon the issues of negligence and contributory negligence would exclude the necessity of an issue of the last clear chance. *R. R. v. R. R.*, 369.

10. *Same—Proximate Cause—Instructions—Appeal and Error.*—Under the circumstances of this case, instructions as to whether the plaintiff's train remaining upon the defendant's track after the expiration of its ten minutes permit was or was not the proximate cause of the injury received by a collision from defendant's train on its main line, with its imminent chances of arrival: *Held*, reversible error to defendant's prejudice, for which a new trial is granted. *Ibid.*

11. *Cities and Towns—Streets and Sidewalks—Danger to Pedestrians—Contributory Negligence.*—In this case the evidence tended to show that the plaintiff fell at night into a hole in the sidewalk negligently left unguarded and without signal lights of the danger, while returning from his work at night: *Held*, no evidence sufficient to be submitted to the jury upon the question of contributory negligence. *Neal v. Marion*, 126 N. C., 412, cited and distinguished. *Carrick v. Power Co.*, 378.

12. *Master and Servant—Safe Place to Work—Contributory Negligence—Evidence.*—When there is sufficient evidence tending to show the employer's negligence in not providing his

CONTRIBUTORY NEGLIGENCE—*Continued.*

employee a safe place in which to fix certain shafting run by steam power, causing him to be injured, while placing a belt upon a machine at the top of a stepladder provided for the purpose, the jury, before answering the issue as to contributory negligence in the affirmative, must be satisfied by the greater weight of the evidence that the plaintiff knew of the danger which he was incurring or in the exercise of reasonable care should have known it; and that the work was so obviously dangerous that a man of reasonable prudence would not have engaged in it; or that in its performance he did not exercise reasonable care for his own safety. *Patterson v. Nichols*, 46.

13. *Electricity — Dangerous Instrumentalities—Children—Parents —Contributory Negligence—Questions for Jury.*—When the evidence tends to show that the plaintiff's intestate, his 6-year-old son, was killed through the negligence of the defendant by a deadly current of electricity from its wires on a pole passing into a loose guy wire whereon the intestate was swinging, as children in the neighborhood were accustomed to do, under dangerous conditions which had previously existed for several months, the pole being uninclosed and unguarded near the home of the plaintiff; that the father was away from home at the time, engaged in his business, and the mother was taking care of her household duties, having a family of several children, it will not be held as a matter of law that the alleged negligence of the parents, in permitting their child to play with the wire, barred a recovery of damages for the wrongful death of the intestate. *Ferrell v. Cotton Mills*, 528.

14. *Negligence—Contributory Negligence—Questions for Jury.*—Whether the brakeman on defendant's train was guilty of contributory negligence or whether the plaintiff was negligent in this case, are for the jury, the evidence on plaintiff's part tending to show that the injury was inflicted by the defendant's negligence in sending cars down a heavy grade of track without proper brakes or an engine attached. *Keller v. Fiber Co.*, 575.

15. *Evidence — Contributory Negligence — Nonsuit.*—A motion to nonsuit on the issue of contributory negligence can only be sustained when the facts necessary to constitute contributory negligence are established by the evidence of the plaintiff. *Ibid.*

16. *Instructions Confusing — Contributory Negligence — Technical Correctness—Explanation—Practice.*—An instruction, in this

CONTRIBUTORY NEGLIGENCE—*Continued.*

case, *Held*, technically correct, but tending to confuse and mislead juries, that if the jury "find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer" affirmatively the issue as to contributory negligence; and it is the better practice for the trial judge to adhere to the practice which requires them to explain the conduct of the plaintiff which will amount to negligence, and instruct them that if there is negligence which is the real cause of the injury, he cannot recover. *Worley v. Logging Co.*, 490.

17. *Pleadings—Contributory Negligence—Unsafe Conditions—Appliances—Defense—Instructions.*—The defendant being sued by its engineer for damages alleged to have been inflicted on him in a derailment upon an unsafe track and by the use of unsafe appliances, alleged only in its answer, by way of defense, that the plaintiff's injury was caused by his negligently operating or running the train: *Held*, as there was no evidence of negligence as alleged, the defendant's prayers for instruction upon contributory negligence were properly refused. *Ibid.*

18. *Master and Servant — Contributory Negligence — Dangerous Conditions—Assumption of Risks.*—The doctrine of contributory negligence, in an action for damages by defendant's engineer caused from a derailment and the unsafe condition of the track and equipment, is not made to depend upon the plaintiff's realization that he is using a defective appliance under dangerous conditions, but upon whether he was negligent in doing the particular work, or that the danger was so obvious that the chances of injury were greater than those of safety. *Ibid.*

19. *Master and Servant—Contributory Negligence.*—Contributory negligence on the part of a minor child, 13 years old, employed with the consent of the parent to do a certain kind of work, is no defense in an action for personal injury received by the minor while working for the master under more dangerous conditions, to which the parent has not given his consent. *Haynie v. Power Co.*, 503.

CONVERSATIONS. See Evidence, 4.

CO-ORDINATE BRANCHES OF GOVERNMENT. See Constitutional Law, 20.

CORPORATIONS.

1. *Railroads—Relief Department—Corporations—Ultra Vires.*—It is not *ultra vires* for a railroad to establish a relief depart-

CORPORATIONS—*Continued.*

ment for the benefit of employees who are members of it, in case of sickness and accident, charging the members a fee and contributing to its support and efficiency. *King v. R. R.*, 44.

2. *Corporations, Insolvent—Factors—Contracts—Consideration—Preferred Stock—Debtor and Creditor—Distribution.*—An agreement entered into by a manufacturing corporation and a factor provided that the latter should take a certain amount of preferred stock in the former, and so long as he held the stock he should sell at a certain commission the product of the corporation, the stock to be taken up by the corporation if the account was changed. By mutual consent this agreement was transferred by the factor to the plaintiff along with the preferred stock, and the corporation having become insolvent, the plaintiff seeks as a creditor a priority of payment of his stock to the other preferred stock issued by the corporation, there being insufficient funds after the payment of debts to pay this stock in full: *Held*, (1) the contract did not contemplate the insolvency of the corporation, and hence the question as to whether the corporation could thus retire its stock did not arise; (2) the plaintiff was not to be regarded as a creditor. He was entitled only to his pro rata part in the distribution of the funds with the other holders of the preferred stock. *Farrish v. Cotton Mills*, 188.

3. *Corporations—Bills and Notes—President—Authority—Ultra Vires—Consideration.*—A bank desiring to borrow money from its correspondent bank hypothecated as collateral to its own note a note obtained from the president of a local oil mill corporation, signed with the name of the corporation by the president, without any consideration moving to the oil company being shown. The local bank being insolvent, the correspondent bank, as an innocent purchaser for value, sued the oil company on the collateral note, and the defense was the failure of consideration and lack of authority of the president to give the corporation's note. A motion to nonsuit was improperly sustained. *Bank v. Oil Co.*, 302.

4. *Evidence—Corporations—Officers—Declarations—Hearsay.*—Declarations of officers are inadmissible as tending to show negligence on the part of the corporation in an action for damages, except when the declarations are shown to have been made by them in the line of their official duty at the time they are discharging this duty in a transaction for the company. *Lytton v. Manufacturing Co.*, 331.

CORPORATIONS—*Continued.*

5. *Evidence—Negligence—Insurance—Third Parties.*—In an action for damages for a personal injury, evidence that the defendant's liability for the act complained of has been insured by a third person is entirely foreign to the issue, and is incompetent. *Ibid.*

6. *Insurance—Interpretation of Statutes.*—Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, real or pretended, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with. *S. v. Arlington*, 640.

7. *Insurance—Foreign Corporations—Local Branches—Sick and Death Benefits—License to Agents—Insurance Commissioner—Interpretation of Statutes.*—A corporation organized with a home office in another State, with executory supervision and control of branch organizations, in some respects local in their character, with provision in the by-laws that the local branch may pay sick and death benefits to their members, the local organizations paying certain fees to the home office for new and old members, comes within the intent and meaning of our insurance laws, requiring that all insurance companies must be licensed and supervised by the Insurance Commissioner (Revisal, sec. 4691); that every agent must pay a license tax, etc. (Revisal, sec. 4706); that a general or district agent or organizer or local or canvassing agent must pay a certain tax as to each, section 4714 (3). *Ibid.*

8. *Insurance Companies—Foreign Corporations—Fraternal Orders—Interpretation of Statutes.*—Fraternal insurance orders are such as make provision for sick and death benefits (Revisal, 4794, *et seq.*), and they are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not required to make the deposit or have the paid-up capital required of other companies. *Ibid.*

9. *Insurance — Foreign Corporations—Fraternal Orders—Definition—Interpretation of Statutes.*—One who without license from the Insurance Commissioner, advertises and represents that a certain order operating from another State "was there"; that he was the representative; that the order paid accident and death benefits; that he solicited people to "come at once and join"; that he gave a membership receipt to those who applied and paid the membership price, is an insurance agent within the purview of the statute, and

CORPORATIONS—*Continued.*

indictable thereunder for soliciting insurance in a company not complying with our laws and for not having been licensed by the Insurance Commissioner to solicit business. *Ibid.*

10. *Insurance—Foreign Corporations—Control of Home Office—License—Option to Insure—Local Branches.*—When it appears that a foreign fraternal order is doing business in this State by organizing local branches, a conviction can be had if, under its constitution, its local branches, having the insurance features of death and sick benefits, have been organized in all portions of the country, doing business under by-laws furnished by the home office, and in its scheme of government the authority of the home office is so absolute and all-pervading that it must be judged and have its status fixed by what it sanctions and approves; and this position may not be properly altered or affected because some particular local branch does or does not adopt the insurance feature. *Ibid.*

11. *Insurance — Unincorporated Companies — Interpretation of Statutes.*—Our statutes relating to the regulation and supervision of insurance companies by the Insurance Commissioner uses the words insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. *Ibid.*

CORPORATIONS, PUBLIC SERVICE. See Telephone Companies.

COSTS. See Appeal and Error, 30, 33, 37, 38.

COUNTERCLAIM. See Courts, 13, 22.

COUNTIES.

1. *County Commissioners—Sheriff's Commissions—Official Capacity—Counterclaim—Cross-actions—New Matter.*—A sheriff in his answer to an action by a graded school and the county commissioners for balance of taxes collected by him, due and not paid over, may not set up a counterclaim for commissions on taxes for previous years collected by one wrongfully appointed for the purpose by the county commissioners, for this is a cross-action against the plaintiffs for their alleged wrongful act as county commissioners in their official capacity, which he could not maintain if brought directly. *Graded School v. Commissioners*, 316.

2. *Counties—Agencies of Government—Legislative Discretion—Annexation of Territory.*—Counties being agencies for the

COUNTIES—*Continued.*

State for the convenience of local government, and under almost unlimited legislative control, except where restricted by constitutional provision, it was within the power of the Legislature to enact into a valid law chapter 591, Public Laws of 1911, taking certain described territory from the limits of Cumberland County and including it within those of Harnett County; and except as to taxes levied previously to the enforcement of the act, and criminal cases theretofore commenced, as expressly provided in the act itself, the county of Cumberland and its officers may not further exercise any direct authority in the territory excluded therefrom. *Board of Trustees v. Webb*, 155 N. C., 379, cited and applied. *Commissioners v. Commissioners*, 514.

3. *Same—Taxation—Original Power—Roll-call Bills—Aye and No Vote—Constitutional Law.*—The power to exercise ordinary governmental functions, collecting taxes, and the like, having been conferred originally on a county, it is not required that an act which adds territory to that county by taking it from an adjoining county be a roll-call bill passed on separate days upon an "aye" and "no" vote, in compliance with section 14, Article II of the Constitution, for the county to exercise the right of taxation over the territory annexed, for such power already existed by virtue of the prior act of its creation; and the questions of contracting debts and the levy and collection of taxes to pay them are properly referable to the statutes, general or special, controlling in such matters. *Ibid.*

4. *Counties—Agencies of Government—Legislative Discretion—Mandatory Powers—Interpretation of Statutes.*—When a portion of the territory of one county is detached from it and added to another county, the burden of existent indebtedness and the apportionment thereof, in the absence of constitutional provision, and in so far as the inhabitants are concerned, is referred entirely to the legislative discretion; and when it appears from the act that the commissioners of each county "have full power and authority to properly adjust the share of the bonded and floating debt" outstanding of the county from which the territory is detached, "and to make an equitable levy of taxes thereon to cover the same and to provide for the collection and payment thereof," the power conferred imposes the duty for its exercise. *Ibid.*

COUNTY COMMISSIONERS. See Counties, 1.

COURTS. See Questions of Law; Interpretation of Statutes, 9; Habeas Corpus, 4.

1. *Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.*—When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions. *Horton v. R. R.*, 146.

2. *Equity—Creditor's Bill—Liens—Amount of Claim—Superior Court's Jurisdiction—Justice's Courts.*—The Superior Court having taken charge of the debtor's property in a creditor's bill under its general jurisdiction, may collect and dispose of all the assets and determine the liens and priorities and make application accordingly of the funds, irrespective of the amount of any claim, including liens for labor and material less than $200, of which otherwise the court of a justice of the peace would have jurisdiction. *Fulp v. Power Co.*, 157.

3. *Courts, Justice's—Appeal—Time of Docketing—Procedure.*—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the Superior Court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Revisal, sec. 608. *Peltz v. Bailey*, 166.

4. *Same — Recordari — Laches—Attorney and Client.*—When an appeal from a justice's court has not been docketed within the time prescribed by the statute (Revisal, sec. 608), the appellant should move for a *recordari*, at the first ensuing term of the Superior Court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a *recordari* and to make proper inquiry of the clerk of the Superior Court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. *Ibid.*

5. *Timber — Sizes—Injunction—Ascertainment of Size—Experts —Reference—Power of Court.*—When a conveyance of lands reserved in the grantor all the timber thereon, and it appears by construction of the instrument that the trees should be of that size as of the date of the deed, it is reversible error

COURTS—*Continued.*

for the court, not having found that the contention of the plaintiff was not *bona fide* (Revisal, 809), to dissolve an order restraining the cutting of the timber upon the defendant's giving bond, solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size at the date of the deed (Revisal, 809), as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. (Revisal, 519 (3).) *Kelly v. Lumber Co.*, 175.

6. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing. *Coltrane v. Laughlin*, 282.

7. *Same—Tenants in Common—Contracts to Convey—Deeds and Conveyances.*—In special proceedings for partition of lands by tenants in common, left them under the will of their father as remaindermen after the life estate of their mother, one of them set up a parol contract alleged to have been made by the others, to convey the lands upon consideration of his having moved upon the lands and taken care of the mother during her lifetime, and the issue thus raised was transferred to the civil-issue docket, and an order of reference made, whereupon it was found that no such contract was made, and it was so adjudged, and judgment duly entered, that the claimant account for the rents and profits for the time he was in possession cultivating the land, and that he recover a certain sum of money, which was the difference between this and the value of the improvements he had put upon the lands: *Held*, the tenant setting up the contract was estopped by the former judgment from suing to recover damages for breach of the alleged contract to convey the lands, and to condemn and apply the proceeds of a sale thereof to satisfaction of such damages; for while it may not have been necessary in the former action for the plaintiff in this one to have alleged the contract in order to recover for permanent improvements, it was included in the scope of the former inquiry and concluded by the judgment therein. *Ibid.*

8. *Tenants in Common—Plea—Sole Seizin—Jurisdiction—Ejectment—Procedure.*—In proceedings by tenants in common for

COURTS—*Continued.*

partition of lands, a plea of sole seizin by one of them may be entered before the clerk, and on transfer to the court in term, the issue will be determined as in an action of ejectment. *Ibid.*

9. *Verdict—Judgment—Extent of Error Ascertained—Supreme Court—Procedure.*—Where under an erroneous instruction the jury has awarded double the amount of the damages actually sustained by the plaintiff in an action of trespass and unlawful cutting of timber trees in the counties specified in the Laws of 1907, ch. 320, and it can readily be ascertained from the verdict what sum is properly recoverable, the correction will be made in the Supreme Court without granting a new trial. *Lumber Co. v. Hayes*, 333.

10. *Reference Set Aside—Discretion—Appeal and Error.*—The setting aside an order of reference by the trial judge upon the exercise of a lawful discretion is not reviewable on appeal. *Lance v. Russell*, 448.

11. *Same — Consent Reference — Consent of Parties — Power of Courts—Jurisdiction.*—Neither party to a consent reference can withdraw therefrom, and it cannot be set aside except by mutual consent, or by the court, retaining jurisdiction, for good cause shown. *Ibid.*

12. *Reference — Set Aside — "Good Cause Shown"—Appeal and Error.*—The judge, by finding as a fact that one who was a necessary party to be bound had not consented to the reference, and that the objecting party had therein been misled, establishes a "good cause shown," and his action in setting aside the former order and report of the referee thereon is not error. *Ibid.*

13. *Courts—Discretion—Counterclaim—Amendments—Appeal and Error.*—The filing of an amended answer setting up a counterclaim is in the discretion of the trial judge and is not reviewable on appeal. *Church v. Dawson*, 566.

14. *Tenants in Common — Partition—Parties—Pleadings—Clerks of Court.*—In proceedings for partition of lands held in common, the petitioners are not entitled as matter of right to have a part only of the lands divided; and the defendants may, by answer, have included in the proceedings for a division such other lands as are held in common between the same parties. *Luther v. Luther*, 499.

15. *Same—Superior Court—Amendments.*—In proceedings for partition of lands held in common, it is proper for the peti-

COURTS—*Continued.*

tioners to move before the clerk to strike from the defendant's answer allegations as to other lands not held in common by the same parties; but when on appeal, by order of court, the lands objected to are excluded from the proceedings, the judge can hear and determine all matters then embraced in the controversy, and proceed with the determination of the cause as amended. *Ibid.*

16. *Federal Constitution—"Full Faith and Credit"—Judgments—Divorce.*—The courts of this State will give full faith and credit under the Federal Constitution to a decree of divorce rendered in another State as regards its own citizens. *In re Alderman,* 507.

17. *Parent and Child—Property—Vested Rights—Divorce—Judgment—Extraterritorial Jurisdiction.*—A child is not regarded as the property of the parent so as to give him a vested right in the child or its services under a decree of divorce, and the decree in this respect has no extraterritorial effect beyond the boundaries of the State where it was rendered. *Ibid.*

18. *Same—Habeas Corpus—Custody of Child.*—After a decree of divorce in another State awarding the care of the child of the marriage to the mother, the mother and child became citizens and residents of North Carolina, and while so residing the father brought proceedings here in *habeas corpus* for the custody of the child, which was denied. The father then contended that according to the decree of divorcement he was entitled to visit the child, etc.: *Held,* the decree relied upon was not subject to this interpretation; but, if otherwise, it would not have extraterritorial effect, under the full faith and credit clause of the Federal Constitution, beyond the State wherein it was rendered, so as to affect the inherent power of this State in awarding the custody of the child, which had become domiciled here. *Ibid.*

19. *Indictment—Assault—Rape—Jurisdiction Concurrent—Magistrate's Cognizance—Burden of Proof.*—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the Superior Court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission"; for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. Revisal, sec. 1427. *S. v. Smith,* 578.

COURTS—*Continued.*

20. *Statutes — Alternate Punishments — Discretion of Courts — Leniency—Appeal and Error.*—When a statute makes certain acts an offense and punishable by "fine and imprisonment," the trial judge may impose either punishment or both; but if it were otherwise, a defendant has no ground for appeal that both sentences were not imposed on him. *S. v. Blake*, 608.

21. *Recorder's Courts—Jurisdiction Exclusive—Legislative Powers —Corporate Limits—Constitutional Law.*—Section 27, Article IV of the State Constitution, as modified by section 14 of the same article, authorizes and empowers the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits. *S. v. Doster*, 634.

22. *Same.*—An act creating a recorder's court for an incorporated town, conferring exclusive jurisdiction over offenses cognizable in courts of a justice of the peace, is void in so far as it seeks to extend the jurisdiction and make the same exclusive as to such offenses committed in the township beyond the corporate limits of the town. *Ibid.*

23. *Cities and Towns—Police Powers—Billboards—Discretion—Courts.*—The courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion. *Small v. Edenton*, 146 N. C., 527, overruling *S. v. Higgs*, 126 N. C., 1014, cited and approved. *S. v. Staples*, 637.

24. *Same—Ordinances—Conflagrations—Health.*—It is within the police powers of a municipality and a valid exercise of its discretionary power, to pass an ordinance, as a preventive against fires and in furtherance of the health of the town, requiring that "billboards or other similar structures used solely for the purpose of displaying posters or other public advertisements" shall not be nearer the ground than 24 inches, except where they are erected and maintained against a wall, and imposing a fine as a punishment for its violation. *S. v. Whitlock*, 149 N. C., 542, cited and distinguished. *Ibid.*

CREDIT BONDS. See Insurance.

CROSS-ACTIONS. See Counties, 1.

CURTILAGE. See Negligence, 42.

DAMAGES. See Master and Servant, 25; Measure of Damages, 1, 2, 3, 4, 5, 6, 7, 8; Negligence, 12; Railroads, 26; Deeds and Conveyances, 22; Evidence, 75, 77.

DAMAGES, DOUBLE. See Interpretation of Statutes, 7, 8.

DANGEROUS CONDITIONS. See Negligence, 16, 17, 18, 19, 20, 21.

DANGEROUS INSTRUMENTALITIES. See Master and Servant. 20, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42; Negligence, 36, 37, 39, 40, 41, 51, 52.

DEADLY WEAPONS. See Presumptions, 4.

DEBTOR AND CREDITOR. See Gifts, 3, 4, 5, 6, 7, 8; Usury.

DEBTS. See Process, 5.

DECLARATIONS. See Evidence, 47.

DEEDS AND CONVEYANCES. See Contracts.

1. *Deeds and Conveyances — Warranty — Breach — Railroads—Easements—Notice—Pleadings—Demurrer.*—A purchaser of lands upon which the right of way of the North Carolina Railroad partially lies is fixed with notice of the easement, and is presumed to have taken it into consideration in the terms of purchase; therefore, when an action is based solely upon a covenant of warranty in a deed which does not exclude therefrom an easement of the said railroad company in the lands conveyed, this easement will not be construed as a breach of the warranty, and a demurrer to the complaint solely on that ground will be sustained. *Goodman v. Heilig*, 6.

2. *Deeds and Conveyances — Privy Examination — Purchaser — Notice—Fraud—Burden of Proof.*—The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. *Brite v. Penny*, 110.

3. *Deeds and Conveyances—Fraud—Sale of Stock—Mortgages—Misrepresentations — Evidence — Questions for Jury.* — Evidence to set aside for fraud a mortgage deed given to the defendant by plaintiff to secure money with which to purchase stock the defendant was offering for sale examined and held to be sufficient for submission to the jury. *Ibid.*

4. *Liens—Conditional Sale—Reservation of Title—Realty—Registration.*—Goods sold under a contract reserving title in the

DEEDS AND CONVEYANCES—*Continued.*

vendor, which are attached to the realty, become realty except as between the parties, but not as against others who have acquired a lien for labor and material before the registration of the conditional sale. *Fulp v. Power Co.*, 157.

5. *Statute of Frauds—Contract to Convey Lands—Memoranda—Lawfully Authorized Agent.*—A memorandum of a contract to convey land, written at the request of the contracting parties and in their presence, sufficiently stating the terms and conditions of sale, designating the lands sold, with the names of the parties appearing therein, is sufficient to make a valid contract under the statute of frauds. *Wellman v. Horn*, 170.

6. *Same—Signing—Name in Memoranda.*—It is not necessary that a contract to convey lands be subscribed by the party to be bound thereby, and the requirements of the statute of frauds are met if his duly authorized agent write his name within a sufficient memorandum of the agreement. *Ibid.*

7. *Statute of Frauds—Contract to Convey Lands—Lawfully Authorized Agent—Parol Authority.*—The authority of a duly authorized agent of a party to be bound by a contract to convey lands need not be in writing under the statute of frauds. *Ibid.*

8. *Same—Description—Signing—Name in Memorandum.*—A, having agreed to sell his home place to B, the parties requested C to witness the terms and conditions of the sale, and B having given A his note in part payment of the purchase money, C, in the presence of A and B, wrote the following memorandum of sale: "$5,000 January 2, 1911, $5,000 January 2, 1912. B to pay the above to A when he makes deed to A for B's home place, 3 October, 1910." C read this memorandum over to A and B, and they said it was correct. B resisted suit to recover the purchase price on the ground of the statute of frauds: *Held*, C was the lawfully authorized agent of A to write the contract, within the meaning of the statute of frauds; the property contracted for was sufficiently described; the writing of A's name in the memorandum was a sufficient signing, and the contract is a valid one. *Ibid.*

9. *Homestead—Ownership and Occupation—Deeds and Conveyances—Fraud.*—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them (Revisal, secs. 961-963), and has continued in the occupation of the lands, he is still entitled to his homestead

DEEDS AND CONVEYANCES—*Continued.*

interest therein. Revisal, sec. 686, has no application. *Sash Co. v. Parker*, 153 N. C., 130, cited and distinguished. *Rose v. Bryan*, 173.

10. *Deeds and Conveyances—Timber Reserved—Time of Cutting—Notice to Grantor—Grantee of Timber.*—A conveyance of lands reserving in the grantor all the timber of every description, without specifying within what time the timber is to be removed, requires by construction that the grantor should remove the timber within a reasonable time after notice to do so given by the grantee; and the grantee of the timber reserved holds the reservation of the timber in the same plight as this grantor held it. *Kelly v. Lumber Co.*, 175.

11. *Deeds and Conveyances — Timber Reserved—Size — Date of Deed.*—A reservation in the grantor of the timber upon the lands conveyed is of such trees large enough to be timber at the time of the execution of the deed. *Ibid.*

12. *Same — Injunction — Ascertainment of Size—Experts—Reference—Power of Court.*—When a conveyance of lands reserved in the grantor all the timber thereon, and it appears by construction of the instrument that the trees should be of that size as of the date of the deed, it is reversible error for the court, not having found that the contention of the plaintiff was not *bona fide* (Revisal, 809), to dissolve an order restraining the cutting of the timber upon the defendant's giving bond, solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size at the date of the deed (Revisal, 809), as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. (Revisal, 519 (3).) *Ibid.*

13. *Deeds and Conveyances—Timber Reserved—Size—Specifications as to Wood and Fence Rails—Interpretation.*—A conveyance of land reserved in the grantor all timber trees thereon, but permitted the grantee to cut firewood and fence rails from trees "not over 14 inches in diameter 2 feet from the ground": *Held*, the specification of the sizes of the trees from which the grantee could cut firewood and fence rails, without prospective words, does not of itself affect the construction of the deed that the trees large enough for timber were reserved. *Ibid.*

14. *Deeds and Conveyances—Chain of Title—Estoppel by Deed.*—A deed in defendant's chain of title introduced for the purpose of estoppel in an action involving title, cannot have that

DEEDS AND CONVEYANCES—*Continued.*

effect if defendant has failed to connect plaintiff's chain of title with it. *McBrayer v. Blanton*, 320.

15. *Deeds and Conveyances—Chain of Title—Locus in Quo—Identification—Burden of Proof.*—In an action involving title to disputed lands it is for the party relying upon a deed in his chain of title to establish that it covered the *locus in quo*, and the failure of the trial judge to so charge in proper instances constitutes reversible error. *Ibid.*

16. *Deeds and Conveyances—Executors and Administrators—Authority—Ancient Deeds—Recitals.*—An ancient deed by an administrator to be sufficient within itself should contain recitals to show the authority of the administrator to make it. *Ibid.*

17. *Deeds and Conveyances — Title — Common Source—Color of Title—Evidence, Conflicting—Nonsuit.*—In an action involving the title to a lappage of land by deed, both parties claiming from a common source, it was admitted that the plaintiff's deed covered the *locus in quo*, the plaintiff asserting ownership by reason of seven years adverse possession under color of title. Upon conflicting evidence as to defendant's possession: *Held*, a motion to nonsuit was properly overruled. *Morse v. Freeman*, 385.

18. *Deeds and Conveyances—Calls—Course and Distance—"Lappage"—Color of Title.*—The plaintiff and defendant claimed the *locus in quo* from a common source of title, the lands admittedly a lappage within the description of both deeds, the defendant's deed being senior in date and registration, and describing the line in dispute as "along the upper edge of the cliff . . . in a westwardly direction to the beginning." There was conflicting evidence as to whether there was a line of "cliffs" coming within the description, and it appears that if "course and distance" governed, the line would go straight to the beginning and exclude the *locus in quo* from defendant's deed. An instruction held correct which substantially charged, (1) that in fixing the disputed line the course and distance would control if under the evidence the jury should find there were no cliffs that would fit the description in the defendant's deed; (2) that if the plaintiff had been in possession of the lap, or any part thereof continuously, adversely, notoriously, and exclusively for seven years next before the institution of the action, it would ripen the title to the lands in the plaintiff. *Ibid.*

19. *Pleadings—Lis Pendens—Deeds and Conveyances—Registration—Notice.*—When a complaint in an action to recover

DEEDS AND CONVEYANCES—*Continued.*

lands operates as a *lis pendens*, evidence as to the date of a deed to a purchaser thereof for value subsequently registered becomes immaterial, as the deed becomes effective from the date of its registration and the vendee is a purchaser with notice. *Simmons v. Fleming*, 389.

20. *Deeds and Conveyances—Descriptions—Evidence.*—There must be competent evidence to fit the lands in controversy to the description in the deed, for the party claiming under the deed to recover. *Beard v. Taylor*, 440.

21. *Deeds and Conveyances—Description—Uncertainty—Impossible of Location.*—A deed to the purchaser of lands at an execution sale is void for uncertainty of description which conveys "about eleven acres (of land owned by T.) where he now lives, excepting three acres, including house and barn, which was allotted to him as his homestead, the remaining eight acres or so much thereof as may be necessary to satisfy said execution," for the reason that it is impossible to say what part of the eight acres is intended to be conveyed. *Ibid.*

22. *Deeds and Conveyances—Breach of Contract—Damages—Attorney's Fees.*—As to whether the plaintiff is chargeable with costs and attorney's fees as damages for the breach of warranty of title to land set up in his counterclaim, see, as controlling, *Wiggins v. Pender*, 132 N. C., 628; *Jones v. Balsley*, 154 N. C., 61. *Culver v. Jennings*, 565.

DEFEASANCE. See Wills, 1, 2, 3.

DELIBERATION. See Homicide, 3.

DELIVERY. See Gifts, 1, 2; Carriers of Goods, 1, 2, 3, 4.

DEMURRER. See Trusts and Trustees, 1, 2, 3, 4.

1. *Deeds and Conveyances—Warranty—Breach—Railroads—Easements—Notice—Pleadings—Demurrer.*—A purchaser of lands upon which the right of way of the North Carolina Railroad partially lies is fixed with notice of the easement, and is presumed to have taken it into consideration in the terms of purchase; therefore, when an action is based solely upon a covenant of warranty in a deed which does not exclude therefrom an easement of the said railroad company in the lands conveyed, this easement will not be construed as a breach of the warranty, and a demurrer to the complaint solely on that ground will be sustained. *Goodman v. Heilig*, 6.

DEMURRER—*Continued.*

2. *Insurance—Pleadings—Demurrer.*—A complaint which joins an indemnity company as a party defendant in an action for personal injuries sustained, and which was covered in the policy contract, sets forth no cause of action against the indemnity company, which alleges a contract between the defendants for the protection of the employer alone, without allegation of an assignment to the suing employee or insolvency of the employer, and a demurrer on the ground of misjoinder of parties should be sustained as to the defendant indemnity company. *Clark v. Bonsal,* 270.

DEPOSITIONS. See Motions, 1, 2.

DEPOSITORY. See Wills, 13.

DESCRIPTIONS, UNCERTAINTY. See Deeds and Conveyances, 20, 21.

DEVELOPMENTS. See Railroads, 24.

DEVISES. See Wills, 1, 2, 3.

DISCRETION. See Bond Issues, 5; Railroads, 28; Courts, 4, 13, 23, 24.

DISTRIBUTION. See Corporations, 2; Trusts and Trustees, 4.

DITCHES. See Cities and Towns, 6.

DIVORCE.

1. *Divorce, Absolute—Adultery of Wife—Burden of Proof—Actions at Law.*—While in certain instances of an equitable nature there is a requirement that the proof be "clear, strong, and convincing," and in criminal cases the State must prove its charge "beyond a reasonable doubt," this intensity of proof is not required in an action for absolute divorce brought by the husband on the ground of the wife's adultery, the action being one at law and only requiring proof of the act by the preponderance of the evidence. *Ellett v. Ellett,* 161.

2. *Divorce, Absolute—Adultery of Wife—Abandonment by Husband—Harmless Error—Instructions.*—In an action for absolute divorce brought by the husband on the ground of the wife's adultery, a finding by the jury that before the time of the adultery the plaintiff had maliciously turned his wife out of doors, does not render harmless an instruction erroneously imposing upon the plaintiff the burden of showing the act of the wife's adultery by "clear, strong, and convincing proof." *Ibid.*

DIVORCE—*Continued.*

3. *Divorce, Absolute—Wife's Adultery—Abandonment—Interpretation of Statutes.*—Under our statutes, under certain conditions, an agreement for separation executed by the husband and wife is valid (Revisal, sec. 2116) ; and when abandoned by her husband, the wife may sue for support of herself and children without seeking a divorce (Revisal, sec. 1292). Hence, the doctrine laid down by our older decisions does not in reason apply, which rendered the adulterous conduct of the wife after abandonment no ground for divorce, especially, as in this case, where the husband under an agreement of separation was supporting his wife at the time of her alleged acts of adultery. *Ibid.*

4. *Divorce a Mensa—"Six Months" Period—Evidence.*—On appeal from an order allowing alimony *pendente lite* in an action for divorce *a mensa* brought by the wife, the objection that the judge in the lower court considered evidence of the conduct of the husband to the wife within six months of the institution of the suit will not be held for error when it also appears that there was evidence sufficient of acts done before the sixth months statutory period of time to sustain the order. *Sanders v. Sanders,* 229.

5. *Same—Alimony Pendente Lite—Removing Property—Fraud.*—An order allowing the wife alimony *pendente lite* in her action for divorce *a mensa,* on facts within the six months, will not be disturbed on appeal when it appears from findings of fact by the judge of the lower court, upon sufficient affidavits, and which will entitle the plaintiff to divorce if established, that the defendant is attempting to remove from the State, and to dispose of his property and remove it from the State, whereby the plaintiff may be disappointed of her alimony. Revisal, secs. 1562, 1563, 1566. *Ibid.*

6. *Same—Averments—"Information and Belief"—Jurisdictional Affidavits.*—The matters in the jurisdictional affidavit in an action for divorce *a mensa* brought by the wife may be stated in general terms following the language of the statute, Revisal, sec. 1563, and also when certain allegations that the defendant is about to remove himself and his property from the State to defeat the right of alimony of the wife are necessary; but no order should be made to deprive defendant of his property unless the facts appear upon which the plaintiff's information and belief are founded, and it is proper and sufficient to show such facts in supplementary or additional affidavits. *Ibid.*

7. *Same—"Condition Intolerable"—Interpretation of Statutes.*—When in an action by the wife for divorce *a mensa* there is

DIVORCE—*Continued.*

evidence tending to show that the plaintiff, in her married life, was free from blame and that the defendant's conduct was a long course of neglect, of cruelty, humiliation, and insult, repeated and persisted in, it is sufficient to bring the cause within the purview of Revisal, sec. 1652, subsec. 4, that he had offered "such indignities to her person as to render her condition intolerable and her life burdensome." *Ibid.*

8. *Same—Wife's Condition.*—The acts of the husband which will render the wife's "condition intolerable and her life burdensome," Revisal, sec. 1652, subsec. 4, so as to entitle her to a divorce *a mensa*, are largely dependent on the facts in each particular case, such as the station in life, temperament, state of health, habits and feelings of the plaintiff. *Ibid.*

9. *Same—Averment—Positive Terms.*—In an action by the wife for divorce *a mensa*, when the allegations are necessary that the defendant is about to remove himself and property from the State to jeopardize the plaintiff's right to alimony, it is not presumed that the wife would have personal knowledge of her husband's plans or purpose in this regard, and an averment thereof in positive terms and of her personal knowledge is not required. *Ibid.*

10. *Parent and Child—Property—Vested Rights—Divorce—Judgment—Extraterritorial Jurisdiction.*—A child is not regarded as the property of the parent so as to give him a vested right in the child or its services under a decree of divorce, and the decree in this respect has no extraterritorial effect beyond the boundaries of the State where it was rendered. *In re Alderman*, 507.

11. *Same—Habeas Corpus—Custody of Child.*—After a decree of divorce in another State awarding the care of the child of the marriage to the mother, the mother and child became citizens and residents of North Carolina, and while so residing the father brought proceedings here in *habeas corpus* for the custody of the child, which was denied. The father then contended that according to the decree of divorcement he was entitled to visit the child, etc.: *Held*, the decree relied upon was not subject to this interpretation; but, if otherwise, it would not have extraterritorial effect, under the full faith and credit clause of the Federal Constitution, beyond the State wherein it was rendered, so as affect the inherent power of this State in awarding the custody of the child, which had become domiciled here. *Ibid.*

DOCKETING. See Appeal and Error, 16, 17.

DOGS. See Constitutional Law, 19, 21.

DOWER. See Trusts and Trustees, 1, 2, 3, 4.

DRUNKENNESS. See Homicide, 2, 3, 14.

DUE PROCESS. See Constitutional Law, 13.

EASEMENTS. See Railroads, 2, 3.

1. *Condemnation — Damages — Special Benefits — Offsets.* — In awarding damages against a county for constructing a public road over private property, the owner is compensated for the taking of the property for public use when the benefits he will receive are equal to the value of the land taken. *Phifer v. Commissioners*, 150.

2. *Same—Legislative Authority—Vested Rights — Constitutional Law.*—The Legislature has the constitutional authority to provide that the special benefits to be derived to the owner of lands over which a county constructs a public road shall be an offset against damages sustained by the owner in having his lands thus taken for public use; and this requirement can be changed by the Legislature at any time before the rights of the parties are settled and vested by verdict and judgment. *Ibid.*

3. *Condemnation — Damages — Special Benefits — Offsets.*—Only those benefits which are special to the owner of lands taken by the county in constructing a public road across them can be considered as an offset to the damages claimed by him, and not such as he shares with other persons in similar circumstances, unless the statute provides differently. *Ibid.*

4. *Same—Speculative Damages—Evidence.*—In this action against the county for damages to plaintiff for taking his lands in the construction of a road across them, evidence was competent that the value of the lands would be increased because of the special benefits thus to be derived by the owner, and not objectionable as being speculative or remote. *Ibid.*

5. *Cities and Towns—Condemnation—Special Acts—Requisites—General Laws—Interpretation of Statutes.*—An incorporated town was authorized to erect, own, and operate an electric plant under chapter 217, Private Laws of 1911, conferring the power of condemnation "in the same manner as is now provided by law for the condemnation of lands for streets." The charter of the town contains no method of procedure for condemning lands for streets: *Held*, that to lawfully authorize a municipal corporation to exercise the right of eminent domain the power must be expressly conferred or arise by

EASEMENTS—*Continued.*

necessary implication and the procedure necessary to give it effect must be provided; but a valid exercise of this power may be done by the municipality under the general law, ch. 86, sec. 1, Public Laws of 1911, where all requisite powers are conferred. *Eppley v. Bryson City*, 487.

EJECTMENT. See Tenants in Common, 3.

ELECTRICITY. See Negligence, 33, 34, 35, 38, 39, 41, 42.

EMPLOYER AND EMPLOYEE. See Master and Servant.

EMPLOYER'S LIABILITY ACT. See Railroads, 16, 17, 18, 19.

EQUITABLE ESTATES. See Trusts and Trustees, 1, 2, 3, 4.

EQUITY.

1. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Equity—Credits on Judgment—Procedure.*—As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered. *Wacksmuth v. R. R.*, 34.

2. *Equity—Creditor's Bill — Liens—Amount of Claim — Superior Court's Jurisdiction—Justice's Courts.*—The Superior Court having taken charge of the debtor's property in a creditor's bill under its general jurisdiction, may collect and dispose of all the assets and determine the liens and priorities and make application accordingly of the funds, irrespective of the amount of any claim, including liens for labor and material less than $200, of which otherwise the court of a justice of the peace would have jurisdiction. *Fulp v. Power Co.*, 157.

3. *Homestead—Ownership and Occupation—Deeds and Conveyances—Fraud.*—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them (Revisal, secs. 961-963), and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Revisal, sec. 686, has no application. *Sash Co. v. Parker*, 153 N. C., 130, cited and distinguished. *Rose v. Bryan*, 173.

4. *Insurance—Indemnity—Equity.*—An injured employee may not proceed originally against an indemnity company which has insured the employer against loss from such injury, in the absence of an assignment by the employer of the policy to

EQUITY—*Continued.*

him, except by attachment or bill in the nature of an equitable *fi. fa.*, or some action in the nature of final process incident to the bankruptcy or insolvency of the insured. *Clark v. Bonsal*, 270.

5. *Clerks of Courts—Jurisdiction—Equity—Transfer to Term—Superior Courts.*—In special proceedings for the partition of lands by tenants in common, wherein one of them asks for specific performance by the others of a contract to convey their interests therein, the clerk of the court may not grant the equitable relief sought, but upon his transferring the issue to the civil-issue docket, the Superior Court has the acquired jurisdiction to determine the question thus presented and to afford adequate relief. *Coltrane v. Laughlin*, 282.

6. *Debtor and Creditor—Insolvency—Gifts—Improving Property of Another—Equity.*—An insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Michael v. Moore*, 462.

7. *Same—Husband and Wife—Contract—Fraud.*—The right of the creditors of an insolvent husband to follow his funds used in making improvements upon his wife's lands is an equitable one, and does not rest on contract, and the money so invested is regarded as a "personal fund fraudulently withdrawn from the husband's creditors." *Ibid.*

8. *Debtor and Creditor—Insolvency—Gifts—Husband and Wife—Improving Wife's Property—Fraudulent Purpose—Intent—Equity.*—The funds of an insolvent husband invested in improvements on his wife's lands, in fraud of his creditors, is not regarded in equity as being a part of his wife's property, and may be subjected by the creditors to the payment of their debts, though the husband may not have intended to defraud them, or the wife may not have known of or participated therein, if he had such intention. *Ibid.*

ESTATES. See Trusts and Trustees, 1, 2, 3, 4.

ESTATES.

1. *Wills—Devises—Defeasible Fee—Life Estate—Limitations of Actions.*—A devise of lands terminable upon the death of the devisee "without lawful issue" is a life estate upon the happening of the contingent defeasible event, and the statute of limitations does not begin to run against the remainderman in fee until the life estate falls in. *Maynard v. Sears*, 1.

ESTATES—*Continued.*

2. *Wills — Estates for Life — Remaindermen — Purchaser with Knowledge—Evidence—Cutting Timber.*—The devisees of the remainder of personalty brought suit against the vendee of the life tenant, alleging and introducing evidence tending to show that the lands in controversy were bought with moneys in which the grantor had only a life interest under the will; and, also, that the vendee, in consideration of his deed, had agreed to move on the land and support the vendor, the life tenant, during her life, with knowledge of her life estate therein: *Held*, competent for the plaintiff to prove that the defendant had cut and removed a large part of the timber on the land as tending to show that he knew he had no just claim on the land in fee, and was taking advantage of everything he could before being called upon to account. *Simmons v. Fleming*, 389.

3. *Instructions—Estates for Life—Property Consumed in Use—Lands.*—An instruction upon the principle that a life tenant has the right to property the use of which naturally consumes it, has no application to this case wherein the money had been invested in lands, and the cutting of timber was the matter involved. *Ibid.*

4. *Estates for Life—Personalty—Takers in Succession—Investments—Interest—Specific Bequests—Executors and Administrators.*—When the beneficiaries of a residuary bequest of personal property are to enjoy it in succession, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder; but when the bequest is specific and is not of the residue, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman. *Ibid.*

ESTOPPEL.

1. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing. *Coltrane v. Laughlin*, 282.

ESTOPPEL—*Continued.*

2. *Attorney and Client—Principal and Agent—Waiver of Client's Rights—Ratification—Estoppel.*—As a general rule, an attorney cannot waive any of the substantial rights of his client without the latter's consent, and he is not bound by the attempted waiver, unless there be a ratification, or something which amounts to an estoppel. *Hall v. Presnell*, 290.

3. *Deeds and Conveyances—Chain of Title—Estoppel by Deed.*—A deed in defendant's chain of title introduced for the purpose of estoppel in an action involving title cannot have that effect if defendant has failed to connect plaintiff's chain of title with it. *McBrayer v. Blanton*, 320.

4. *Damages — Release—Mental Incapacity—Pleadings—Sanity—Evidence—Estoppel.*—In an action for damages for a personal injury alleged to have been caused by the negligence of the defendant, the plaintiff sought to set aside a release from further liability, on the ground of his mental incapacity, caused by the injury, at the time of executing the release: *Held*, it was unnecessary for plaintiff to allege and prove sanity since that time to maintain his action, and the doctrine of estoppel would rather apply to defendant, who alleged his sanity at the time of the release. *Brazille v. Barytes Co.*, 454.

EVIDENCE. See Gifts, 2; Motions, 7; Burden of Proof, 1; Railroads, 30.

1. *Wills — Devises—Defeasible Fee—Devisor's Title—Identification—Evidence.*—In an action brought by the heir at law of the remainderman to recover lands devised to his ancestor, evidence is sufficient as tending to show that the title to the lands in dispute was in the devisor, when the will itself shows he claimed the fee, and the testimony of a witness was that when he first knew the lands he was about five or six years old and the devisor cultivated them, and that the description of the lands in the will embraced the *locus in quo*, which he identified and described, and that upon the death of the devisor the devisee took possession of and cultivated the land, and stated that his title was "only good for life," with other evidence that there was a defect of the fee-simple title in him. *Maynard v. Sears*, 1.

2. *Evidence — Lands — Acts of Ownership — Age of Witness — Weight of Evidence—Questions for Jury.*—When a witness, testifying as to acts of ownership of one having claimed the title to lands in dispute, says that at the time he was five or six years old, the weight of his testimony is for the jury to determine. *Ibid.*

EVIDENCE—*Continued.*

3. *Nonsuit—Evidence—Questions for Jury.*—In this case there was sufficient evidence to be submitted to the jury upon the question as to whether the plaintiffs were the heirs at law of J. S., under whom they claimed certain lands, the title to which was in dispute, and therefore a motion to nonsuit upon the evidence on that ground was improperly sustained. *Ibid.*

4. *Evidence—Witness, Nonexpert—Opinion Upon the Facts.*—In an action to recover under a contract for boring an artesian well, wherein it is alleged that the plaintiff was wrongfully prevented from completing the contract, and defended upon the ground that the plaintiff did not use the proper machinery, especially for straightening crooked places caused by a deflection of hard rock, it is competent for a witness for plaintiff to testify that the machine used was "the best and latest all-round equipped machine for drilling water wells," and that it had all proper and necessary tools for drilling and straightening crooks, etc., and that he could have bored to the required depth with them, it being "the testimony of a witness to a physical fact peculiarly within his knowledge" and not requiring expert evidence. *Jeffords v. Waterworks Co.*, 10.

5. *Pleadings—Contracts—Evidence.*—In an action brought upon contract, evidence relating to a second contract which was not pleaded is incompetent. *Ibid.*

6. *Evidence — Depositions — Nonresidents — Parties—Commencement of Action.*—The depositions of a party, objected to because the deponent was in the State when the action was begun, are competent when it appears that he was a resident of another State and not within this State at the time of the trial. Revisal, 1645 (9). *Ibid.*

7. *Contracts—Written—Fraud—Parol Evidence—Conversations.*—Without allegation of fraud or misrepresentation, conversations preceding the execution of a written contract are incompetent to vary, alter, or contradict its terms. *Ibid.*

8. *Evidence—Contracts—Use of Improper Machinery—Former Use.*—When the defense in an action to recover upon a contract to bore an artesian well, alleging that the defendant wrongfully stopped the plaintiff from boring it, is that the plaintiff was not using proper machinery and equipment, evidence as to the insufficiency of a machine formerly used is incompetent. *Ibid.*

9. *Evidence—Depositions—Motion to Quash—Objections and Exceptions—Practice.*—A deposition can be quashed only for

EVIDENCE—*Continued.*

irregularities in the taking or the incompetency of the witness, and exception should be taken to the questions and answers of the deponent and not by motion to quash the depositions. *Ibid.*

10. *Evidence—Depositions—Commission—Name of Witness—Practice.*—It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exception is taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. Revisal, 1652. *Ibid.*

11. *Appeal and Error — Reference — Findings — Evidence.* — The facts found by the referee and confirmed by the trial judge are not reviewable on appeal when there is evidence to support them; and exceptions to such findings, that they are "contrary to the weight of the evidence," cannot be sustained. *Ibid.*

12. *Highways—Automobiles—Negligence—Evidence—Nonsuit.*—In an action for damages for personal injury received by reason of the team plaintiff was driving becoming frightened from a motor vehicle approaching from the rear, there was evidence tending to show that the speed of the automobile greatly exceeded the limit prescribed by the Laws of 1909, ch. 445, and that the machine was upon the plaintiff's team without adequate warning and without giving him "any chance to hold on to his horses": *Held*, sufficient to go to the jury upon the question of defendant's actionable negligence, not so much and of itself that the speed limit was exceeded, but tending to show the defendant's negligence in not doing what the circumstances reasonably required for the plaintiff's safety; and upon conflicting evidence, a motion to nonsuit should be denied. *Curry v. Fleer*, 16.

13. *Evidence—Objections and Exceptions—Appeal and Error—Harmless Error.*—Over defendant's objection, plaintiff was permitted to ask the witness of the former if he had not sold his land to the defendant at a big price: *Held*, if on the facts the answer had a reasonable and natural tendency to create a bias in defendant's favor it was relevant; and if otherwise, it would be harmless and not reversible error. *Ibid.*

14. *Same—Compensatory Damages—Evidence—Questions for Jury.* Upon the question of allowing exemplary as well as actual damages in this case, as presented, for the disconnection of

EVIDENCE—*Continued.*

the plaintiff's service by the defendant telephone company, the jury should consider as circumstances relevant to the inquiry evidence tending to show that the plaintiff informed the defendant of the payment he had made, that he had a receipt therefor, that the defendant still insisted there was no such payment, and further, that the plaintiff had several times made default in payment of his dues, and that the defendant had been informed by its proper agents that plaintiff owed the balance concerning which the service had been disconnected. *Carmichael v. Telephone Co.*, 21.

15. *Appeal and Error—Service of Case—Extension of Time—Agreement in Writing—Practice.*—When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Supreme Court Rule 39. *Mirror Co. v. Casualty Co.*, 28.

16. *Railroads — Negligence — Relief Department — Acceptance of Benefits — Written Contract — Parol Evidence.* — The word "benefits" as ordinarily used in the regulations of a railroad company's relief department does not include hospital treatment and medical attention; and as it is the acceptance by a member of that department of the benefits thereunder which may, in proper cases, bar his recovery for damages for a personal injury negligently inflicted by the company, and as the act of acceptance, when in dispute, is not included in any part of the written contract embraced in the regulations, it may be shown or disproved by parol evidence of the circumstances connected with it. *Wacksmuth v. R. R.*, 34.

17. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Contracts—Evidence.*—When in defense to an action for damages for personal injuries inflicted upon an employee, a railroad company relies upon the acceptance of benefits by the employee as a member of its relief department as a bar under the rules and regulations of the department, it is competent for the plaintiff, as tending to avoid the bar, to show that he had accepted the benefits under the assurance of the defendant that it would do certain things in regard to keeping him as an employee, etc., which it had failed to do, and that, relying on this promise, he had accepted the benefits; and evidence in this case *Held* sufficient to sustain a verdict in plaintiff's favor on the issue as to whether the plaintiff, after his injury, voluntarily accepted the benefits under his contract. *Ibid.*

EVIDENCE—*Continued.*

18. *Railroads — Negligence—Relief Department — Acceptance of Benefits—Promise—Contracts—Burden of Proof—Evidence—Questions for Jury.*—It is a voluntary acceptance by an employee, a member of a railroad company's relief department, of the benefits of that department, after an injury has been inflicted, that bars his right to recover damages from the company; and when the defense in the action is that the plaintiff had promised to accept the benefits, it is necessary for the defendant to show an acceptance of the promise and its performance thereof in order to render the defense available. *King v. R. R., post,* 44, cited as controlling. *Ibid.*

19. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Equity—Credits on Judgment—Procedure.*—As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered. *Ibid.*

20. *Carriers of Goods—Delayed Delivery—Reasonable Time—Consignee's Readiness — Negligence — Evidence.*—When, in an action by the shipper against the carrier for damages to a shipment of fruit trees to his sales agent, alleged to have been caused by the carrier's negligence in an unreasonable delay in transportation and delivery, the defense is relied on that the plaintiff's agent was not ready to receive them when they arrived, it is competent for the plaintiff to show, in explanation why his agent did not wait for their arrival and upon the measure of damages, that orders had been obtained for the trees by traveling agents upon a salary, and they had been sold for a certain aggregate sum to various parties to be delivered when they called for them at destination upon notice at a certain time; and, also, an order from one of plaintiff's customers requiring the trees to be delivered accordingly. *Young v. R. R.,* 74.

21. *Contracts—Principal and Agent—General Charge—Evidence—Questions for Jury.*—The defendant, having made by letter a definite proposition to the plaintiff to work on his farm, requested an acceptance of the proposition by telegram, with which the plaintiff complied. The plaintiff then went to the defendant's farm and his employment was accepted in accordance with the terms of the proposition by one who was in possession, assuming full control and management for the defendant; and there was evidence of ratification by the de-

EVIDENCE—*Continued.*

fendant at a subsequent time when he visited his farm: *Held*, (1) the question of plaintiff's employment under the contract did not depend solely upon whether the defendant received the telegraphic reply to his written proposition, but also upon whether it was consummated by the acts of the defendant's agent; (2) the recognition by the defendant of this agency, with full knowledge of the facts, was a ratification of the agent's prior acts, and his assent to what the agent had done was equivalent to prior authority given; (3) evidence that the defendant placed the agent in general charge of his farm, with apparent right to make contracts of employment, is competent to be considered by the jury upon the question whether an agency of the character claimed existed or not. *Trollinger v. Fleer*, 81.

22. *Master and Servant—Negligence—Safe Place to Work—Duty of Master—Negligence—Evidence.*—When in an action for damages for a personal injury received by an employee while at work in a machine shop, there is evidence tending to show that a brass chip from a boring mill struck him in the eye and caused the injury complained of, which would not have occurred if a screen, known and in general use, had been furnished and properly placed, evidence is competent to show from the condition of an air hammer with which the plaintiff was at work at the time, and from the fact that plaintiff was not then striking with it, that the injury could not have been caused by a chip flying on account of his own negligent use of the hammer, the defendant contending that the injury was caused by a chip from the air hammer. *Pritchett v. R. R.*, 88.

23. *Master and Servant—Contributory Negligence—Declarations of Master—Haste—Unaccustomed Work—Evidence.*—The plaintiff was an employee of the defendant in its machine shop, and there was evidence tending to show that he was injured in the eye by a flying brass chip from a boring mill operated near, without the customary guard for his protection, just after he had been ordered there by defendant's foreman: *Held*, evidence is competent, on the question of contributory negligence, tending to show that the defendant's foreman told the plaintiff shortly prior to the injury that they were behind on that particular piece of work and he wanted him to assist on the job in the place of the regular man, who was sick. *Ibid.*

24. *Master and Servant—Safe Place to Work—Flying Chips—Screen—Negligence—Evidence.*—The plaintiff was injured in

EVIDENCE—*Continued.*

the eye while working in defendant's machine shop, and there was evidence tending to show that it was received by a flying brass chip from a boring mill, operated near the place where he was at work, which would not have occurred had the borer been guarded by a shield customary and in general use: *Held*, evidence is competent that this machine had theretofore thrown chips in the place where plaintiff was working when injured, under similar conditions, for the purpose of fixing the defendant with notice of the danger. *Ibid.*

25. *Master and Servant—Safe Place to Work—Negligence—Former Conditions—Notice Implied—Ordinary Care—Evidence.*—The burden of proof is on the plaintiff to show that the place furnished him by the employer to work in was unsafe, when for that reason he seeks to recover damages for an injury therein inflicted, and that the defendant knew it to be so, or that it could have discovered it by the exercise of ordinary care; and evidence that the condition complained of had previously existed for a long period of time is evidence of defendant's knowledge. *Ibid.*

26. *Master and Servant—Safe Place to Work—Machine Shop—Flying Chips of Metal—Guard—Negligence—Evidence.*—In an action to recover damages for a personal injury to the plaintiff's eye, there was evidence that the injury occurred on the day of his employment in a machine shop with complicated machinery in motion; that the place of his employment was new to him, and that the injury was caused by a brass chip flying from a boring mill located near, which started in operation after he had begun a piece of work requiring him to face the boring mill in its performance, and which was without a guard in general use, which would have arrested the chip and avoided the injury, if properly placed; that owing to the character of the wound, the injury was caused by a chip from the boring mill, which was throwing the chips around the place where plaintiff was necessarily at work, and not from the machine plaintiff was operating at the time: *Held*, sufficient evidence of defendant's negligence as the proximate cause of the injury, on a motion to nonsuit. *Ibid.*

27. *Deeds and Conveyances—Fraud—Sale of Stock—Mortgages—Misrepresentations — Evidence — Questions for Jury.* — Evidence to set aside for fraud a mortgage deed given to the defendant by plaintiff to secure money with which to pur-

EVIDENCE—*Continued.*

chase stock the defendant was offering for sale examined and held to be sufficient for submission to the jury. *Brite v. Penny*, 110.

28. *Principal and Agent—Corporations—Officers—Fraud—Corporate Acts—Evidence.*—A corporation dealing in stock is fixed with notice of a fraudulent transaction induced by its president, secretary, treasurer, and owner of nearly its whole stock, in which a large profit in the sale of the stock has been realized in the usual business channels of the company, the stock sold having been listed with the corporation for sale; and the transaction complained of will be deemed, in the absence of evidence to the contrary, to have been done in behalf of the corporation and not of the officer who consummated it in his individual capacity. *Ibid.*

29. *Master and Servant—Duty of Master—Negligence—Evidence—Nonsuit.*—In an action to recover damages for the alleged negligent killing of plaintiff's intestate, employed by defendant to operate a rip-saw in his plant operated by steam, there was evidence tending to show that the saw was "wobbly" and operated with antiquated machinery upon a table that was of an obsolete kind, and by belts nearly horizontally placed, without boxing or guards, so that planks could readily fall upon them under the circumstances of the employment, and cause the injury complained of, by being hurled from the running belt, and in no other manner; that the machinery and appliances furnished were not such as were known, approved, and in general use, and if they had been the injury would not have been inflicted: *Held*, the evidence was sufficient for the jury to find that the plank had been hurled upon the plaintiff's intestate from the unguarded belt, owing to the defendant's negligence, and a motion to nonsuit was properly overruled. *Walker v. Manufacturing Co.*, 131.

30. *Insurance—Premiums—Notes—Extension — Parol Evidence — —Payment.*—When upon its face in express terms a note given by an insurer for a premium due on his life insurance policy declares that the policy is void if the note be not paid when due, the position is not available that the note was given for the payment of the premium and not for an extension of time within which to pay it. *Sexton v. Insurance Co.*, 142.

31. *Insurance — Premiums—Receipts—Possession—Payment—Evidence.*—When a note is given for a premium due on a life insurance policy and attached to it is a paper-writing pur-

EVIDENCE—*Continued.*

porting to be a receipt for the premium, the paper-writing attached to the note is not evidence that the note was given and received as a payment of the premium, when it is undelivered and in the possession of the insurance company, and produced at the trial upon legal notice to do so. *Ibid.*

32. *Railroads—Master and Servant—Defective Appliances—Negligence—Evidence.*—When there is evidence tending to show that the eye of the engineer of the defendant railroad company was injured by an explosion of the water-glass in the cab of his locomotive, while in the discharge of his duties, and that the injury could not have happened had the defendant, after notice, supplied the water-glass with the usual shield or guard in general use by railroad companies, it is sufficient upon the question of defendant's negligence. *Horton v. R. R.*, 146.

33. *Condemnation—Speculative Damages—Evidence.*—In this action against the county for damages to plaintiff for taking his lands in the construction of a road across them, evidence was competent that the value of the lands would be increased because of the special benefits thus to be derived by the owner, and not objectionable as being speculative or remote. *Phifer v. Commissioners*, 150.

34. *Timber—Sizes—Injunction—Ascertainment of Size—Experts—Reference—Power of Court.*—When a conveyance of lands reserved in the grantor all the timber thereon, and it appears by construction of the instrument that the trees should be of that size as of the date of the deed, it is reversible error for the court, not having found that the contention of the plaintiff was not *bona fide* (Revisal, 809), to dissolve an order restraining the cutting of the timber upon the defendant's giving bond, solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size at the date of the deed (Revisal, 809), as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. (Revisal, 519 (3).) *Kelly v. Lumber Co.*, 175.

35. *Slander—Intent—Evidence — Larceny—"Took" and "Stole"—Words and Phrases—Unequivocal Terms—Burden of Proof—Questions for Jury.*—In an action for damages for slanderous words spoken by defendant of plaintiff, the evidence for plaintiff tended only to show that defendant on several occasions had said to others that his brother had caught the plaintiff "taking some pokes of cotton out of his patch the night before," which he (the defendant) believed to be true;

EVIDENCE—*Continued.*

that on another occasion the plaintiff and defendant were together with the purpose of the latter to "make up the trouble," the former denying that he had taken the cotton, the latter insisting that he had, from the information his brother had given: *Held,* the evidence was not an unequivocal statement that plaintiff had stolen the cotton, and being capable of a different construction, was properly submitted to the jury, with the burden of proof on the plaintiff to show whether the words, in view of the circumstances under which they were used, naturally imported that the plaintiff had stolen the cotton, and whether defendant so intended to state. *Fields v. Bynum,* 156 N. C., 413, cited and distinguished. *McCall v. Sustair,* 179.

36. *Divorce a Mensa—"Six Months" Period—Evidence.*—On appeal from an order allowing alimony *pendente lite* in an action for divorce *a mensa* brought by the wife, the objection that the judge in the lower court considered evidence of the conduct of the husband to the wife within six months of the institution of the suit will not be held for error when it also appears that there was evidence sufficient of acts done before the six months statutory period of time to sustain the order. *Sanders v. Sanders,* 229.

37. *Cities and Towns — Streets — Evidence—Nonsuit—Statute of Limitations—Harmless Error.*—In this case damages are recoverable by plaintiff for diminution in the value of his property abutting on the street caused by the city's negligent construction in making authorized changes, and the error committed in the lower court in sustaining a nonsuit upon the evidence is adjudged harmless by reason of the statute of limitations having run against plaintiff's cause of action. *Earnhardt v. Commissioners,* 234.

38. *Cities and Towns—Negligence—Statute of Limitations—Pleadings—Evidence.*—The statute of limitation of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred. *Ibid.*

39. *Carriers of Goods—Live Stock—Negligence—Evidence.*—A common carrier received a shipment of valuable horses, issuing therefor its usual live-stock bill of lading, confining recovery, in event of injury, to the inadequate maximum sum of $100

EVIDENCE—*Continued.*

each, at the same time being informed of the character of the horses, and that there was a stallion among them which would injure the other animals if allowed to mingle with them; and in consequence undertook to box off the stallion to itself in the car with the others. There was evidence tending to show that the boxing-off of the stallion was a "sorry job," and being required by a connecting line of carriers to make it more secure, did so, but by mistake placed another horse therein, and put the stallion in with the other horses in the car, resulting in their injury: *Held*, evidence sufficient of the actionable negligence of the initial carrier, and the stipulation in the bill of lading restricting the amount of the recovery is therefore void. *Ibid.*

40. *Cities and Towns — Streets and Sidewalks — Excavations — Guards and Lights—Negligence—Contributory Negligence—Evidence—Questions for Jury.*—In an action against a city or incorporated town for damages sustained by a pedestrian in falling, at night, into an open ditch made for the purpose of laying water or sewer pipes by the defendant's contractor, alleging negligence on defendant's part in not having it properly guarded, the question of defendant's negligence upon conflicting evidence is one for the jury. *Bailey v. Winston*, 252.

41. *Evidence—Hypothetical Questions—Sufficiency of Testimony—Questions of Law—Questions for Jury.*—It is competent for a judge to decide whether there was any evidence of the facts assumed to exist in asking a hypothetical question of an expert, and then leave it to the jury to say whether the facts had been established by the proof, and instruct them, if they had not been, to disregard the answers. *Ibid.*

42. *Principal and Agent—Fraud—Misappropriation of Funds—Cash Transactions—Evidence—Directing Verdict.*—Upon an issue in an action brought by the principal against his agent for embezzlement, or wrongful conversion and fraudulent misapplication of the proceeds from the sale of the plaintiff's stock, it is proper for the trial judge to direct a verdict in defendant's favor where all the evidence, both of plaintiff and defendants, tends to show that the defendants, though instructed to sell for cash, could not do so, and sold the stock for stock in another corporation in part and accepted for the balance cash orders on the corporation issuing the stock, this being deemed by them best for the interest of the principal under the circumstances, and they having received no benefit from the transaction. *Osborne v. Durham*, 562.

EVIDENCE—*Continued.*

43. *Register of Deeds—Marriage License—Penalty Statutes—Reasonable Inquiry—Verdict Directing—Questions of Law.*—Whether a register of deeds made reasonable inquiry, before issuing a marriage license, within the meaning of our statute, becomes a question of law, on admitted facts, and the court may instruct the jury to answer the issue according as it may decide the law upon the facts to be. Rules adopted by the courts for the purpose of determining whether such inquiry has been made by the register of deeds, discussed by MR. JUSTICE WALKER. *Joyner v. Harris*, 295.

44. *Register of Deeds—License—Penalty Statutes—Verdict Directing—Evidence, How Considered.*—Upon issues submitted as to whether a register of deeds made reasonable inquiry before issuing a marriage license, the court's instruction, if the jury believe the evidence they should answer the first issue "Yes" and the second issue "No," and if they did not believe the evidence, to reverse their answers, with the burden of the issues upon the plaintiff, is equivalent to saying there was no evidence which, if believed, entitled the defendant to the verdict, and the evidence will be considered in the light most favorable to him. *Ibid.*

45. *Register of Deeds—Marriage License—Penalty Statutes—Age of Woman—Substantive Evidence.*—In an action against a register of deeds for the penalty prescribed by Revisal, sec. 2083, for issuing a license for the marriage of a woman under 18 years of age, without the consent of the person designated by the statute, it is held that the testimony of a witness as to the age of the woman depending solely upon her statements to him, which he repeated to the register when the license was applied for, is not substantive evidence of her age. *Ibid.*

46. *Railroads—Negligence—Personal Injury—Light or Warnings—Contributory Negligence—Evidence—Nonsuit.*—Evidence tending to show that plaintiff was injured on a dark and cold night with a strong wind blowing, as he was walking along a path by the railroad track, about 2 feet from the end of the cross-ties, by being struck by defendant's switch engine running backward without lights or other warnings of its approach, is sufficient upon the question of defendant's negligence, and while it may be possible in this case that the plaintiff was himself negligent in walking too near the track or attempting to cross it without looking and listening, contributory negligence cannot be inferred as a matter of law, and a motion to nonsuit upon the evidence should not be sustained. *Hammett v. R. R.*, 322.

EVIDENCE—*Continued.*

47. *Evidence — Corporations — Officers — Declarations—Hearsay.*—Declarations of officers are inadmissible as tending to show negligence on the part of the corporation in an action for damages, except when the declarations are shown to have been made by them in the line of their official duty at the time they are discharging this duty in a transaction for the company. *Lytton v. Manufacturing Co.*, 331.

48. *Evidence—Negligence—Insurance—Third Parties.*—In an action for damages for a personal injury, evidence that the defendant's liability for the act complained of has been insured by a third person is entirely foreign to the issue, and is incompetent. *Ibid.*

49. *Contracts—Express Terms—Local Custom—Evidence.*—An ordinary express contract which is definite, specific, and plain of meaning may not, as a rule, be changed or varied by evidence of local custom or usage. *Bowman v. Blankenship*, 376.

50. *Same—Conflicting Evidence—Contracts in General Terms.*—Plaintiff sued for balance claimed to be due him by defendant for sawing lumber of the latter, and introduced evidence tending to prove that he had complied with his contract, which required that he was to saw it in a manner suitable for market and was to "edge it square so as to save loss at the mills." The defendant contended that he did not owe the amount sued for, and offered evidence tending to show that the plaintiff was to square it up and cut it for the shops, which defendant said he knew how to do and had the proper machinery for the purpose, but which he did not do: *Held*, in this case, that testimony tending to show that the lumber cut was "as good as any mill commonly cuts" was competent, in view of the conflicting evidence of what the contract really was, the plaintiff's testimony tending to establish an agreement in terms sufficiently general and indefinite to make the evidence admissible. *Ibid.*

51. *Deeds and Conveyances—Title — Common Source — Color of Title—Evidence, Conflicting—Nonsuit.*—In an action involving the title to a lappage of land by deed, both parties claiming from a common source, it was admitted that the plaintiff's deed covered the *locus in quo*, the plaintiff asserting ownership by reason of seven years adverse possession under color of title. Upon conflicting evidence as to defendant's possession: *Held*, a motion to nonsuit was properly overruled. *Morse v. Freeman*, 385.

EVIDENCE—*Continued.*

52. *Evidence—Maps.*—An unofficial map may be used by witnesses to illustrate their testimony, and in this case the one objected to was enlarged by the surveyor from the court map, who testified to its correctness, without evidence to the contrary, and without objection, and it was *Held*, no error. *Ibid.*

53. *Deeds and Conveyances—Calls—Course and Distance—"Lappage"—Color of Title.*—The plaintiff and defendant claimed the *locus in quo* from a common source of title, the lands admittedly a lappage within the description of both deeds, the defendant's deed being senior in date and registration, and describing the line in dispute as "along the upper edge of the cliff . . . in a westwardly direction to the beginning." There was conflicting evidence as to whether there was a line of "cliffs" coming within the description, and it appears that if "course and distance" governed, the line would go straight to the beginning and exclude the *locus in quo* from defendant's deed. An instruction held correct which substantially charged, (1) that in fixing the disputed line the course and distance would control if under the evidence the jury should find there were no cliffs that would fit the description in the defendant's deed; (2) that if the plaintiff had been in possession of the lap, or any part thereof continuously, adversely, notoriously, and exclusively for seven years next before the institution of the action, it would ripen the title to the lands in the plaintiff. *Ibid.*

54. *Evidence—Interest in Suit—Harmless Error.*—The son claiming title to lands under a deed from his father registered subsequently to the filing of a complaint operating as a *lis pendens*, in an action involving the title of his father, was asked on examination if he was willing to stand or fall with his father in the suit: *Held*, the question was competent as tending to show his interest, but was rendered immaterial by his answer, "I don't know whether I understand you." *Simmons v. Fleming*, 389.

54. *Wills — Estates for Life — Remaindermen — Purchaser with Knowledge—Evidence—Cutting Timber.*—The devisees of the remainder of personalty brought suit against the vendee of the life tenant, alleging and introducing evidence tending to show that the lands in controversy were bought with moneys in which the grantor had only a life interest under the will: and, also, that the vendee, in consideration of his deed, had agreed to move on the land and support the vendor, the life tenant, during her life, with knowledge of her life estate

EVIDENCE—*Continued.*

therein: *Held*, competent for the plaintiff to prove that the defendant had cut and removed a large part of the timber on the land as tending to show that he knew he had no just claim on the land in fee, and was taking advantage of everything he could before being called upon to account. *Ibid.*

55. *Master and Servant—Evidence—Nonsuit.*—Where in the defense to an action for damages for a personal injury the relationship of independent contractor is unsuccessfully relied on by the owner or proprietor, the evidence tending to show that the damages sought were caused by the negligent act of the independent contractor will be considered on motion to nonsuit in the same view as that of the owner and proprietor, and when there is conflicting evidence as to the negligent act, the court may not pass upon the credibility of witnesses, but must leave the question for the determination of the jury. *Arthur v. Henry*, 393.

56. *Same.*—The evidence in this case is sufficient of an agent's negligence for which his principal is responsible in damages caused by blasting near the residence of the plaintiff in an incorporated town, which tends to show that for smothering the blasts six small pine logs were used, that stones were showered on plaintiff's premises, falling around the house in which he and his sister lived, one of the stones "as large as an ordinary letter box" falling beyond the house, and shattering a limb of a tree in front of it, others falling on sheds on the premises and likewise destroying plaintiff's grapevines and fruit tree. *Ibid.*

57. *Master and Servant — Dangerous Work — Wantonness and Recklessness — Punitive Damages — Respondeat Superior.*—When there is evidence that the defendant negligently caused damages to the plaintiff's property from blasting near it, punitive damages are recoverable when it is shown that the defendant evinced a reckless indifference to the rights of the plaintiff, and that the acts complained of were wantonly done, or from a bad motive. *Ibid.*

58. *Same—Evidence.*—The plaintiff may recover punitive damages caused to his premises by the negligent blasting of rock by the defendant nearby, when it is shown that the defendant had unsuccessfully attempted to buy the plaintiff's property, and thereafter, upon complaint of the blasting, had promised to correct the trouble; that he had endeavored to secure the services of the plaintiff to draw contracts for him with other owners of property similarly situated, so that he might escape liability from his blasting operations by lease

EVIDENCE—*Continued.*

to insolvent persons, declaring he was going to operate a power-house all night under plaintiff's threat of indictment; further saying he would find a way without incurring liability, which resulted in his attempting to carry out his purpose by entering into a contract for the continued work to be done by an independent contractor, without regard to the care which should be taken by him, but with provision that the defendant should be saved harmless from liability; that the operations of blasting under the contract were more damaging than theretofore. *Ibid.*

59. *Same—Notice.*—When there is evidence of recklessness and wantonness on the part of defendant's lessee which caused damage to plaintiff's property located near, a conversation between the parties to the effect that a rock had fallen from a blast on the plaintiff's house previously, is competent as tending to fix the defendant with notice of the danger to plaintiff's property at the time of his making the lease set up in defense to avoid liability, there being evidence that the lease was made in order that the defendant might continue to have the blasting done and thus make the defense available to him. *Ibid.*

60. *Punitive Damages—Financial Condition—Measure of Damages —Evidence.*—When punitive damages may be awarded, evidence of the defendant's financial condition is admissible in behalf of the plaintiff. *Ibid.*

61. *Measure of Damages—Dangerous Work—Consult—Negligence —Due Care—Questions for Jury.*—In plaintiff's action for damages to his property for the negligent blasting operations of the defendant, there was conflicting evidence as to whether the plaintiff gave the defendant his consent, and thereafter notified him to desist: *Held*, in this case, that the consent did not imply that the blasting should be done with threatened injury to life and property, and it was for the jury to determine, upon their finding that the consent was given, whether the defendant continued to blast after notice to desist, and whether the defendant continued to blast in a negligent or obviously dangerous manner, such as was inconsistent with due care, or whether from the operations there was no other or further injury to plaintiff's property than was necessarily involved in the operation of the quarry. *Ibid.*

62. *Measure of Damages — Retraxit — Consideration—Evidence— Limitation of Actions.*—When, with competent evidence, the plaintiff has established his right to recover damages to his

EVIDENCE—*Continued.*

property caused by the negligent blasting of rock by the defendant, his statement on the witness stand that he asks no damages prior to a certain date within the statutory time, is not a *retraxit* and is without consideration, and does not bar him of his right to recover all the damages he is entitled to not barred by the statute of limitation pleaded by the defendant. *Ibid.*

63. *Employer and Employee—Safe Place to Work—Negligence—Evidence.*—In an action for damages for personal injury received by the employee, evidence that the cause of the injury was due to the failure of the employer to furnish him a reasonably safe place in which to do the work assigned to him, or proper appliances for the purpose, is evidence of actionable negligence. *Patterson v. Nichols*, 406.

64. *Same—Machinery.*—In an action by the employee for damages for a personal injury received from the alleged negligent failure of the employer to provide him a safe place in which to work, there was evidence tending to show that the employee had fixed a certain piece of shafting suspended about 10 feet from the floor, which required the stopping of a part of the machinery, by throwing off the belt; that there was no "shifter" for this purpose, and to start this part of the machinery in motion again the servant had to mount a ladder placed against the wall in a space of 2 feet between the shaft and the wall, with his back to a projecting set-screw, which should have been counter-sunk, and reach over the pulley to put the belt back on while the other machinery was in motion; that while so doing, with his back necessarily towards the revolving shafting and projecting set-screw, the latter caught him in the collar of his overalls and threw him, to his injury: *Held*, evidence sufficient to take the case to the jury. *Ibid.*

65. *Master and Servant—Safe Place to Work—Contributory Negligence—Evidence.*—When there is sufficient evidence tending to show the employer's negligence in not providing his employee a safe place in which to fix certain shafting run by steam power, causing him to be injured, while placing a belt upon a machine at the top of a stepladder provided for the purpose, the jury, before answering the issue as to contributory negligence in the affirmative, must be satisfied by the greater weight of the evidence that the plaintiff knew of the danger which he was incurring or in the exercise of reasonable care should have known it; and that the work was so obviously dangerous that a man of reasonable pru-

EVIDENCE—*Continued.*

dence would not have engaged in it; or that in its performance he did not exercise reasonable care for his own safety. *Ibid.*

66. *Safe Appliances—Approved and in General Use—Causa Causans—Evidence.*—The plaintiff, while engaged in placing a belt upon a pulley to run certain machines in a laundry, was injured by the collar of his overalls catching on a projecting set-screw on a revolving shaft, 10 feet from the floor, while he was standing upon a stepladder, and there was evidence tending to show that the master had failed to provide a "shifter" which was approved and in general use for the purpose of shifting belts: *Held*, in the absence of evidence tending to show that it was practical to use the "shifter" under the circumstances of this case, and the evidence tending to show that the work being done was unusual in the employee's employment, an instruction was erroneous which involved the application of the principle that the employer should furnish appliances approved and in general use. *Ibid.*

67. *Trespass—Rightful Entry—Unlawful Acts—Evidence—Assault and Battery—Torts—Consequential Damages.*—It is not necessary that the employees of a telegraph company entering rightfully upon the lands of the owner to perform their duties to their employer should actually commit an assault or a battery upon the owner or his family to make the employer liable for the consequent and proximate damages caused by their acts done in violence and in disregard of the owner's rights. *May v. Telegraph Co.*, 416.

68. *Statute of Frauds—Landlord and Tenant—Joint Promisors—Evidence—Questions for Jury.*—In this case the question whether the landlord intended to become a principal with the lessee of his lands, in the debt for fertilizers furnished to make a crop thereon under his promise to see that the merchant got his money, was fairly submitted to the jury under correct instructions of the court upon the evidence. *Whitehurst v. Padgett*, 424.

69. *Statute of Frauds—Landlord and Tenant—"Promise" Relied on—Evidence.*—Evidence tending to show that a landlord, at the time of the transaction, promised a merchant furnishing his tenant fertilizers with which to make a crop on his land, that he would "see" that the fertilizer was paid for, is sufficient evidence to go to the jury as to whether the merchant relied upon the promise at the time it was made, and furnished the fertilizer upon the faith of it. *Ibid.*

EVIDENCE—*Continued.*

70. *Evidence—"Best" or Primary Rule—Book Entries—Parol Evidence—Collateral Matters — Competency—Harmless Error—Appeal and Error.*—In an action against the landlord and tenant for fertilizers furnished to the latter to make a crop on the leased lands of the former, seeking to hold the landlord answerable on his promise to "see" that the fertilizers were paid for, testimony of a witness for the plaintiff that the fertilizers were charged to both defendants is competent: (1) The best or primary rule does not apply, for the book entries were not directly involved in the issue, and were not required to be in writing by the statute of frauds; (2) it was irrelevant as to the tenant, and therefore harmless, and not having been objected to by the landlord, it is not reviewable on appeal as to him. *Ibid.*

71. *Holographic Will—Evidence—Nonsuit.*—The deceased, whose holographic will is caveated, had several places of deposit for his "valuable papers and effects"—his desk in his store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. There was evidence tending to show that after several weeks of unavailing search after his death, a script written by him and sufficient as his holographic will was found in the hall table drawer, which was little used, with his policies of fire insurance, all of which had expired but one, in a package marked "Important," in his own handwriting: *Held,* a motion for judgment of nonsuit upon the evidence should be overruled which was based upon the ground that there was no evidence that the holographic will had been found among "the valuable papers and effects" of the deceased. *In re Jenkins,* 429.

72. *Instructions—Verdict, Directing—Appeal and Error—Absence of Evidence.*—An instruction by the Superior Court, that if the jury find from the evidence the existence of certain facts, to answer an appropriate issue in a certain way, cannot be reviewed in the Supreme Court when the evidence referred to is not disclosed by the record. *Beard v. Taylor,* 440.

73. *Deeds and Conveyances—Descriptions—Evidence.*—There must be competent evidence to fit the lands in controversy to the description in the deed, for the party claiming under the deed to recover. *Ibid.*

74. *Same—False Imprisonment—Assault and Battery—Evidence —Questions for Jury.*—In this action to recover damages for false imprisonment, and assault and battery, alleged to have been received at the hands of defendant's agents, there is sufficient evidence that the acts complained of were done in

EVIDENCE—*Continued.*

the furtherance of the master's work for the application of the doctrine of *respondeat superior.* *Bucken v. R. R.*, 443.

75. *Damages — Release — Mental Incapacity—Evidence—Husband and Wife.*—To set aside a release for damages for personal injuries received, on the ground that the plaintiff was suffering severely from the effects of his injury at the time of its execution and did not have sufficient mental capacity, it is competent for his wife to testify as to his mental incapacity then. *Brazille v. Barytes Co.*, 424.

76. *Master and Servant—Dangerous Instrumentalities—Safe Place to Work—Appliances—Evidence—Nonsuit.* — Upon evidence tending to show that the plaintiff, an uninstructed and inexperienced man, was injured while blasting with dynamite in the employment of the defendant, using an iron tamping rod furnished him and the other employees, which resulted in the explosion causing the injury, a motion to nonsuit should be denied. *Ibid.*

77. *Damages — Release—Mental Incapacity—Pleadings—Sanity—Evidence—Estoppel.*—In an action for damages for a personal injury alleged to have been caused by the negligence of the defendant, the plaintiff sought to set aside a release from further liability, on the ground of his mental incapacity, caused by the injury, at the time of executing the release: *Held*, it was unnecessary for plaintiff to allege and prove sanity since that time to maintain his action, and the doctrine of estoppel would rather apply to defendant, who alleged his sanity at the time of the release. *Ibid.*

78. *Master and Servant—Dangerous Instrumentalities—Instructing Servant—Negligence—Evidence—Instructions.*—Upon the evidence in this case tending to show that plaintiff, an inexperienced man, was employed without instruction to blast with dynamite, using an iron tamping rod furnished him for the purpose, which caused the explosion inflicting the injury complained of: *Held*, not error to refuse a request for instruction, that if the jury believed the evidence to answer in the affirmative the issue of contributory negligence. *Ibid.*

79. *Release—Fraud—Evidence.*—*Held*, evidence sufficient to be submitted to the jury upon the issue of defendant's fraud in obtaining a release for personal injuries alleged to have negligently been inflicted on the plaintiff, which tends to show that the plaintiff signed the release while greatly suffering from the injury, just after he had left the hospital where he had been for treatment; that his wife and brother were

EVIDENCE—*Continued.*

excluded from the room at the time; that he was ignorant and humble, unable to read and write; that he was without advice and counsel of friends, and thought he was signing a receipt for his wages; that the consideration was grossly inadequate. *Ibid.*

80. *Master and Servant—Dangerous Instrumentalities—Contributory Negligence—Assumption of Risks—Burden of Proof—Evidence.*—An inexperienced servant was employed to blast with dynamite, and furnished with iron tamping rods for the purpose, the evidence tending to show that the use of these tamping rods caused the explosion causing the injury complained of. A charge *Held* correct, that "Unless the jury find by the greater weight of the evidence that the plaintiff knew of the great danger in using iron tamping rods, and voluntarily and willingly made up his mind to run the great risk incident to using the same, you will answer the issue 'No,'" and that recovery would not be denied unless in the use of the tamping rod the apparent danger was so great that its assumption would amount to a reckless indifference to probable consequences. *Ibid.*

81. *Master and Servant—Dangerous Instrumentalities—Assumption of Risks—Evidence.*—The servant assumes the risks ordinarily incident to his employment, but does not assume the risk from dangers which arise from the failure of the master to furnish reasonably safe and suitable tools with which to do the work required of him, unless in the careful performance of the work with the tools furnished the inherent probabilities of injury are greater than those of safety. *Ibid.*

82. *Same—Consideration—Parol Evidence.*—The consideration for the lands contracted to be conveyed need not be expressed in the written memorandum or contract required by the statute of frauds, and may be shown by oral evidence. *Bateman v. Hopkins*, 470.

83. *Master and Servant — Negligence — Electricity—Proximity—Contact—Safe Appliances—Evidence—Res Ipsa Loquitur—Questions for Jury.*—A telegraph company's employee was engaged, within the scope of his employment, in stringing telegraph wires above and in close proximity to the live wires of another corporation engaged in furnishing electricity for light and power purposes, and there was evidence tending to show that the work was customarily done in such instances by the use of a rope, and that the employee should have been protected by a guard wire to prevent contact be-

EVIDENCE—*Continued.*

tween the telegraph wire and the live wires. The employee in catching hold of the telegraph wire with his bare hand, under the orders of his superior, was killed by an electrical shock caused by the telegraph wire coming in contact with the live wire; and in an action by his administrator for damages: *Held*, the fact of the injury, under the circumstances, was sufficient to carry the case to the jury. *Hicks v. Telegraph Co.*, 519.

84. *Electricity — Dangerous Instrumentalities—Negligence—Location of Poles—Control—Evidence.*—The plaintiff rented from the defendant one of the tenement-houses at its mill used by its employees, and the plaintiff's intestate, his 6-year-old son, was killed while swinging on a loose guy wire from a pole carrying wires charged with a deadly current of electricity, under circumstances tending to show negligence on the defendant's part. There was no evidence tending to show that any one except defendant had charge of this pole, or had authority to remedy any defects in or about it: *Held*, the defendant's liability did not depend on the question as to whether the pole was on or off the premises which it had rented to the plaintiff. *Ferrell v. Cotton Mills*, 528.

85. *Electricity — Dangerous Instrumentalities—Children—Parents—Contributory Negligence—Questions for Jury.*—When the evidence tends to show that the plaintiff's intestate, his 6-year-old son, was killed through the negligence of the defendant by a deadly current of electricity from its wires on a pole passing into a loose guy wire whereon the intestate was swinging, as children in the neighborhood were accustomed to do, under dangerous conditions which had previously existed for several months, the pole being uninclosed and unguarded near the home of the plaintiff; that the father was away from home at the time, engaged in his business, and the mother was taking care of her household duties, having a family of several children, it will not be held as a matter of law that the alleged negligence of the parents, in permitting their child to play with the wire, barred a recovery of damages for the wrongful death of the intestate. *Ibid.*

86. *Instructions—Evidence.*—A prayer for instruction relating to the contributory negligence of the father, unsupported by the evidence, was properly refused. *Ibid.*

87. *Insurance—"Adjoining and Communicating Additions"—Property Insured—Parol Evidence—Interpretation of Policy.*—In an action by a sanitarium company for loss under a policy of

EVIDENCE—*Continued.*

fire insurance on its "two-story frame metal-roof building, with adjoining and communicating additions, etc.," recovery was resisted on the ground that the policy did not cover a cottage about 15 or 20 feet from the main building, as it was not an "adjoining or communicating addition": *Held,* (1) evidence was competent to fit the cottage to the description in the policy which tended to show that the cottages contained rooms for the patients of the sanitarium who were, under certain circumstances, treated in these rooms; that all were under the same management and that there were call-bells from each of these rooms which communicated with the main building, and that all had the same system of sewerage and water pipes; (2) that the cottages would come within the descriptive terms of the policy as a matter of law; (3) that testimony that the cottages were insured in separate and distinct amounts in another policy would relate to the weight of the testimony and not to its competency. *Sanitarium Co. v. Insurance Co.,* 551.

88. *Insurance, Fire—Title—Evidence—Issued to "Insured"—Possession.*—Evidence that the policy of insurance "was issued to the insured," and that the insured was in possession and control of it, is sufficient upon the question of the plaintiff's title, in his action to recover damages from the fire to his property on his policy of insurance, and conclusive unless in some way questioned or impeached. *Ibid.*

89. *Adverse Possession—Title—Evidence.*—The defendant having shown, in deraigning his title, a grant from the State to him of the *locus in quo,* the plaintiff introduced evidence tending to show that the land was unfit for cultivation and that for more than twenty years next before the commencement of the action his tenants had continuously used it for "timber, wood, pine," and that they "would cut wood there nearly every day," that being the only purpose for which it was available; that the plaintiff had cut roads through the lands which his tenants had used, as well as other roads theretofore cut; that plaintiff was using it for its timber and for the purpose of subsequently getting a water supply therefrom: *Held,* evidence of adverse possession sufficient to ripen defendant's title, for the determination of the jury. *Berry v. McPherson,* 153 N. C., 4, cited and applied. *Coxe v. Carpenter,* 557.

90. *Reference—Findings of Fact—Evidence—Appeal and Error.*—The findings of fact by the referee upon competent evidence, confirmed by the trial judge, are not reviewable on appeal. *Ibid.,* 566.

EVIDENCE—*Continued.*

91. *Objections and Exceptions — Contentions — Evidence—Appeal and Error.*—Exceptions to the statement of the trial judge of the contention of the parties upon the evidence are not reviewable on appeal. *Lumber Co. v. Moffitt*, 568.

92. *Held,* in this case, a judgment of nonsuit upon the evidence was properly denied the defendant, and that the charge of the court followed well-settled principles of law. *Fisher v. Fiber Co.*, 571.

93. *Negligence—Contributory Negligence—Questions for Jury.*—Whether the brakeman on defendant's train was guilty of contributory negligence or whether the plaintiff was negligent in this case, are for the jury, the evidence on plaintiff's part tending to show that the injury was inflicted by defendant's negligence in sending cars down a heavy grade of track without proper brakes or an engine attached. *Keller v. Fiber Co.*, 575.

94. *Contributory Negligence—Nonsuit.*—A motion to nonsuit on the issue of contributory negligence can only be sustained when the facts necessary to constitute contributory negligence are established by the evidence of the plaintiff. *Ibid.*

95. *Master and Servant—Duty of Master—Evidence.*—The servant was injured while at work in a woodworking plant of the master, at a lathe machine, and introduced evidence tending to show that the cause of the injury was the failure of the defendant to furnish a guard or shield to go over the machine to prevent its throwing splinters and pieces of wood back, and that the guards or shields were approved and in general use in plants of like character: *Held,* sufficient to go to the jury upon the question of defendant's negligence. *Rogers v. Manufacturing Co.*, 484.

96. *Railroads—Negligence—Derailment—Unsafe Road—Appliances —Presumptions—Verdict, Directing.*—When the evidence is not conflicting and tends to show that the plaintiff was injured while operating defendant's train, by a derailment upon an unsafe roadbed, with unusually dangerous grades and curves, and that the equipment used was defective, the trial judge may properly direct the jury to answer the issue as to negligence in the affirmative if they found the facts to be as testified. *Worley v. Logging Co.*, 490.

97. *Same—Principal and Agent—Disobedience to Orders—Further Orders — Vice-principal — Evidence—Instructions.*—When in an action for damages to an engineer operating defendant's train run by steam power, there is evidence tending to

EVIDENCE—*Continued.*

show that the injury complained of was caused by a derailment upon an unsafe roadway, and that in the train was a very unsafe car which the superintendent of the defendant company told the plaintiff not to take upon his train again, with further evidence that the car was thereafter loaded with lumber and the plaintiff instructed by another vice-principal of the defendant to take it with him on the occasion of the injury: *Held*, there being no evidence on defendant's part tending to show that its employee who instructed the plaintiff to take the loaded car on the train was not a vice-principal of defendant of equal dignity of the superintendent, it could not avail itself of an instruction precluding recovery if the jury found that the injury would not have occurred had plaintiff obeyed the order of the superintendent not to take the car out again. *Ibid.*

98. *Measure of Damages—Mental Power—Evidence—Instructions.* In an action to recover damages for a personal injury, an instruction is erroneous which tells the jury they may consider under certain conditions and phases of the evidence, as an element of damages, the loss by plaintiff of his mental powers, etc., when there is no suggestion, at any time, that the plaintiff was unconscious, or that his sufferings were of that character; and in this case a new trial is ordered, confined to the issue of damages. *Ibid.*

99. *Appeal and Error — Objections and Exceptions — Evidence — Practice.*—Exceptions to evidence objected to must be taken in order to make the matter available on appeal. *Ibid.*

100. *Evidence—Recent Possession.*—Upon a prosecution of an indictment for stealing a mule, it was admitted that the mule had been stolen, but the defense was relied on that the defendant was not guilty of the offense; and there was evidence on behalf of the State tending to show that under the guise of trading horses the defendant solicited and had his nephew, younger than he and presumably under his influence, to meet him at a certain place, from which the defendant and his nephew drove in a buggy to a point about three miles distant from the home of the prosecuting witness, from which the defendant went alone and soon returned, bringing the stolen mule, and sent his nephew away with it into another State, suggesting a change of name in case of trouble, and giving him money and a pistol for the purpose of the journey; that eventually the nephew returned without the mule, stating that he had sold the animal on certain terms, and shared the proceeds of the sale with

EVIDENCE—*Continued.*

the defendant, returning the money and the pistol the defendant had loaned him: *Held*, an instruction that under this evidence the jury should consider the recent possession of the defendant after the theft as only a circumstance in passing upon defendant's guilt, was not error of which the defendant can complain. The presumption of defendant's guilt from recent possession after the theft discussed by WALKER, J. *S. v. Neville*, 591.

101. *Evidence, Circumstantial—Corroborative—Burden of Proof.*—When the question of defendant's guilt or innocence of the charge of theft depends mainly on the credit the jury may give the testimony of a State's witness, considered in connection with other evidence in corroboration and of a circumstantial character, and is without complication, it is not required that the judge should charge the jury that each circumstance which formed a link in the chain should be established to their full satisfaction. *Ibid.*

102. *Evidence — Collateral Matters — Harmless Error.*—Testimony of a witness who had been convicted of receiving property which defendant was being tried for stealing, as to the contents of a letter he had written the sheriff, without producing the letter, to the effect that he had not stolen the mule, did not tend to prove anything harmful to the defendant, and being collateral to the issue, its admission was not error. *Ibid.*

103. *Evidence — Conversations — Impeachment of Witness.*—After the examination of a State's witness who had received property for stealing which the defendant was being tried, to the effect that he and the defendant had conspired together to that end, it is competent in corroboration for another State's witness to testify to a conversation with the first witness in regard to the arrangements he and the defendant had made for the purpose of the theft. *Ibid.*

104. *Instructions — Evidence—Accomplice—Evidence, Weight of—Harmless Error.*—It was not prejudicial to defendant for the judge, in his instructions to the jury, to refer to a statement made by the solicitor that he would not ask a conviction of the defendant for larceny upon the unsupported testimony of his confederate, and, besides, a conviction could have been had upon the unsupported evidence of the accomplice, if the jury found that he had told the truth. *Ibid.*

105. *Incest — Evidence—Corroboration.*—Under an indictment for incest, proof of other acts of the same nature is competent

EVIDENCE—*Continued.*

in corroboration, and for like purpose of corroboration, evidence is also competent of cruel treatment tending to show compulsion and of pertinent statements made by the witness before the trial. *S. v. Broadway*, 598.

106. *Indictment — Tax Books — Register of Deeds — Mutilation— Township Totals — Auditor's Abstract — Parol Evidence.* — Upon a trial under an indictment of a deputy sheriff for changing the township totals of taxation for fraudulent purposes respecting a settlement thereof, testimony of a witness to the effect that the abstract which he made and sent to the Auditor was a correct copy from the tax list, and that the books now show a mutilation and change of the tax lists as to these township totals, amounting to a certain sum, which the defendant is charged with drawing from the bank of deposit for his own use, is competent, as the abstract sent the Auditor was made from unchanged items and could in no wise be affected by the alteration of the township totals. *S. v. Gouge*, 602.

107. *Same.*—An abstract made by a witness for the State Auditor from the tax list is but a written declaration of the witness which he at one time made as to the amount of the unaltered totals, and it is not necessary that this abstract be produced under an indictment for violation of Revisal, 3508, for the witness to state the township totals therein, for he may now testify what the total was, the parties being entitled to produce the abstract in corroboration or rebuttal, as the case may be, and in this case the addition of the unaltered items was introduced, from which the jury could ascertain whether the totals were correct or not. *Ibid.*

108. *Indictment—Mutilation of Records—Tax Books—Defalcation of Sheriff—Evidence.*—Evidence that a deputy sheriff altered the township totals of taxation taken from the tax book and drew the difference in gold from the bank in order that his defalcation might not be traced to him, is simply that of a circumstance, competent for what it is worth, as tending to show illegality and fraud, under indictment for violating the provisions of Revisal, 3508. *Ibid.*

109. *Same — Character Witnesses — Cross-examination.*—A deputy sheriff was indicted for unlawfully mutilating the township totals of taxation (under Revisal, 3508) made out by the register of deeds and in his office, in order to conceal his defalcation: *Held*, competent on cross-examination of defendant's witness, for him to state that he had threatened the defendant with proceedings before a Superior Court

EVIDENCE—*Continued.*

judge before he would show his books or state the amount he had paid over, and it was not objectionable as an attack on the good character of the witness by proving specific acts of misconduct. *Ibid.*

110. *Same.*—The cross-examination of a character witness is not restricted to the matter brought out on the direct examination, and in this case it was held competent for the State on cross-examination to bring out the fact as an incriminating circumstance, that the defendant, indicted under Revisal, 3508, twice refused to show his books to proper authority, or disclose the tax fund he had paid over, until threatened with legal proceedings. *Ibid.*

111. *Seduction—Letters—Written Admissions—Detached Portions—Severable Matters—Evidence.*—In an action for seduction under promise of marriage, portions of letters written by defendant which contain severable and distinct declarations or admissions tending to establish his guilt are admissible in evidence, and afford the best evidence of their contents. Admissions of this character are not ordinarily considered to be within the best evidence rule. *S. v. Corpening*, 621.

112. *Written Admissions—Detached Portions—Severable Matters—Rebuttal—Practice.*—When an admission appearing in a writing is put in evidence, the whole instrument, or so much of it as relates to the matter embraced in the admission, must be received, subject to the qualification that a party may always offer a distinct and severable portion of a writing containing declarations or admissions of his adversary, which tends to establish his position, leaving to that other the right to put such remaining portions in evidence as may serve to explain or qualify the admission. *Ibid.*

113. *Attorney and Client—Jury—Argument—Law and Fact—Decisions—Application of Law—Improper Remarks—Appeal and Error.*—Under our statute, attorneys are allowed to argue the whole case to the jury, both as to the law and facts, and they are permitted to state the facts of a decision relied on only to the extent of applying the law of such case to the one being tried; hence, upon a trial for seduction under breach of promise of marriage, it is reversible error for the solicitor to be permitted to read the facts stated in an opinion of the Supreme Court relating to a trial for seduction and say, over objection of the defendant, that the jury had convicted the defendant in that case under weaker evidence than in the case at bar. *Ibid.*

EVIDENCE—*Continued.*

114. *Murder—Premeditation—Evidence.*—Upon a trial for murder, evidence that the prisoners, a man and a woman, were heavily drinking, that they fired a gun, having procured shells for the purpose, indiscriminately at houses along the road, to the fear of the occupants and those whom they met; that the male prisoner made threats against the life of the deceased, concurred in by the woman, who afterwards identified and pointed out the deceased, whereupon the male prisoner killed him with the gun he was carrying, is sufficient, upon the question of premeditation to sustain a verdict of murder in the first degree. *S. v. Grainger*, 628.

115. *Murder—Deadly Weapon—Second Degree—Presumptions—Instructions.*—The killing of a human being with a deadly weapon raises the presumption of murder in the second degree, and a request for instruction which assumes a less offense, under conflicting evidence, should be refused. *Ibid.*

116. *Murder—Motive—Burden of Proof.*—The burden is not upon the State to show the motive of one aiding and abetting the committing of murder by another, when the evidence is otherwise sufficient, though the case may be strengthened by showing motive when the evidence is circumstantial. *Ibid.*

EXCAVATIONS. See Negligence, 16.

EXCUSABLE NEGLECT. See Motions, 8.

EXECUTION.

1. *Execution—Debtor and Creditor—Fraud—Improving Wife's Property—Personal Property—Exemption.*—When an insolvent debtor has, in fraud of the rights of his creditors, invested his money in improvements on his wife's lands, and such has been established in a suit by his creditors, the debtor may claim his personal property exemption from the money so invested; and when the pleadings raise this issue, the amount of the personal property exemption must first be deducted from the amount expended in making the improvements, and the clear balance will be the basis for the estimate of the amount subject to the satisfaction of debts. Whether the creditors can recover the entire sum wrongfully used in improving the property, less the exemption, or only the amount by which the property is enhanced in value, *quære.* *Michael v. Moore*, 462.

2. *Same—Appeal and Error—Pleadings—Reformation—Issues—Procedure.*—It appearing in this suit that the creditors of an

EXECUTION—*Continued.*

insolvent defendant are entitled to have improvements put upon his wife's land with his funds subjected to the payment of their debts, from which the debtor may claim his personal property exemption were the pleadings properly drawn to present the issue, the case is remanded with direction to reform the pleadings in accordance with the principles declared, and to submit issues for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and, also, the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See Wills, 8.

1. *Deeds and Conveyances—Executors and Administrators—Authority—Ancient Deeds—Recitals.*—An ancient deed by an administrator to be sufficient within itself should contain recitals to show the authority of the administrator to make it. *McBrayer v. Blanton*, 320.

2. *Appeal and Error—Executors and Administrators—Account and Settlement — Reference — Findings—Attorneys' Fees.*—When fees for attorneys employed by an administrator are found as a fact by a referee to have been unnecessary, and this finding has been approved by the judge of the lower court, the ruling of that court will be approved on appeal, when there is evidence to support it. *Overman v. Lanier*, 544.

3. *Same—Employees—Commissions.*—Upon petition of an administrator for a final account and settlement, an answer was filed by the heirs at law and distributees, and the matter referred. The referee found that the clerk's allowance to the administrator was a commission of $10,000, expenditures for clerks' and attorneys' fees $8,000, or over 16 per cent of the total receipts: *Held*, (1) five per cent is the limit allowed by law, within which the compensation should be proportioned according to the services rendered and in consideration of all the facts and circumstances; (2) the *ex parte* allowance by the clerk is not conclusive; (3) in this case an allowance to the administrator of 4 per cent upon the receipts and 2½ per cent upon the disbursements, approved by the judge, will not be disturbed on appeal. *Ibid.*

4. *Executors and Administrators—Final Account and Settlement—Personal Liability—Wagering Contracts—Burden of Proof—Interpretation of Statutes.*—A petition by an administrator for a final account and settlement was resisted by the heirs

EXECUTORS AND ADMINISTRATORS—*Continued.*

at law and distributees, and the matter referred. In their answer, the defendants alleged that certain notes, valid on their face, were given for a gambling contract in cotton futures, and should not have been paid: *Held*, the provisions of Revisal, sec. 1691, do not apply so as to place the burden of proof on the administrator to show that the notes were given for a valid contract requiring the actual delivery of the cotton; and an exception by the defendant to the report of the referee in holding the payment of the notes a valid disbursement will not be sustained in the absence of any findings as to the nature of the contract for which they were given. *Ibid.*

5. *Executors and Administrators—Insurance Policy as Collateral—Payment of Premiums—Loss to Estate—Personal Charge—Rule of Prudent Man.*—A finding by a referee, confirmed by the judge, that an administrator paid, in good faith, under the rule of the prudent man, premiums on a life insurance policy held as collateral to a note given the deceased, and which ultimately resulted in loss to the estate, will, upon supporting evidence, be upheld on appeal, and the administrator allowed credits for the amounts he has thus paid out. *Ibid.*

6. *Executors and Administrators—Management of Estate—Personal Liability—Appeal and Error.*—Upon the findings of fact by the referee, confirmed by the judge, in this case, as to the administrator's management and sale of a distillery interest and liquor belonging to the estate, the defendant's exceptions of law cannot be sustained. *Ibid.*

7. *Executors and Administrators — Clerk Hire — Commissions.*—Ordinarily administrators should not be allowed for the expenses of a clerk and bookkeeper, so as to increase the amount of the commissions beyond that allowed by the statute. *Ibid.*

8. *Executors and Administrators—Commissions—Counsel's Fees.* While allowances to administrators for counsel fees should be carefully scrutinized by the court, the report of the referee, confirmed by the court, in this case, allowing fees of $1,000 as not being excessive under the conditions disclosed, is sustained. *Ibid.*

9. *Executors and Administrators—Final Account—Personal Liability—Answer—Nature of Action.*—When in answer to a petition by an administrator for an account and settlement, the heirs and distributees seek to charge the administrator personally with debts he has charged against the estate, the

EXECUTORS AND ADMINISTRATORS—*Continued.*

action becomes one personally against the administrator, and as to such things he is not entitled to an attorney's fee for professional legal services rendered therein. *Ibid.*

10. *Same—Partial Recovery—Costs—Statement—Reformation—Interest.*—In this action, in the nature of one to personally charge the administrator with certain debts of the estate, there was final recovery of about $6,000 in excess of the sum the administrator admitted to be due; and all costs should be taxed against him but for the fact that the heirs and distributees unsuccessfully sought to recover further and larger sums; it is adjudged that the cost of the litigation be divided between the parties and that the account of the administrator be reformed, and that interest be charged on the correct amount due by him from the date of his filing his report. *Ibid.*

EXEMPTIONS. See Execution, 1, 2.

1. *Homestead—Ownership and Occupation—Deeds and Conveyances.*—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them (Revisal, secs. 961-963), and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Revisal, sec. 686, has no application. *Sash Co. v. Parker*, 153 N. C., 130, cited and distinguished. *Rose v. Bryan*, 173.

2. *Exemptions—Personalty—Report of Appraisers—Specific Articles.*—When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. Revisal, sec. 695. *Gardner v. McConnaughey*, 481.

3. *Same — Property Exempt — Levy—Time of Sale.*—The judgment debtor is entitled to have his exemption in personal property ascertained up to and just before the process of execution under the judgment is executed by a sale, and to select the articles as provided by statute; and, therefore, when a report of the jury of assessors has been declared void and another allotment is ordered to be made, it is error to include in the reallotment articles of personalty which the judgment debtor may have consumed since the allotment under the void report. The distinction pointed out when a homestead is allotted under Revisal, secs. 687 and 692, by CLARK, C. J. *Ibid.*

EXPERT. See Evidence, 34.

EX POST FACTO LAWS. See Statutes, 9, 10.

FACTORS. See Principal and Agent, 4.

FEDERAL CONSTITUTION. See Constitutional Law, 15.

FELLOW-SERVANT. See Negligence, 35.

FINDINGS. See Appeal and Error, 1.

FOREIGN CORPORATIONS. See Insurance, 17, 18, 19, 21.

FRATERNAL ORDERS. See Insurance, 18, 19.

FRAUDS. See Statute of Frauds; Evidence, 79; Gifts, 4, 5, 6, 7.

FRAUD AND MISTAKE.

1. *Railroads — Relief Department — Benefits—Voluntary Acceptance—Fraud and Undue Influence—Surrounding Conditions —Master and Servant.*—A voluntary acceptance by an employee of a railroad company of the benefits of the latter's relief department so as to release his cause of action for damages arising from the negligence of the company, must be free from fraud and undue influence, by which is meant a controlling influence, impelling him to act as otherwise he would not do, and there may be considered as relevant circumstances the facts that the department was under the control of the master, that the employee might be influenced under this relationship, the absence or presence of the employee's friends or relations, and the presence of employees of the company likely to influence his choice, the physical or mental condition induced by the injury existing at the time of choosing, the general advantage the department holds out for those who are members, and the benefit to the company in causing its employee to determine whether he will sue or accept the benefits under the department. *King v. R. R.*, 44.

2. *Railroads — Relief Department — Member—Voluntary Acceptance—Knowledge—Opportunity—Fraud.*—An employee of a railroad company is required to exercise diligence in protecting his rights in choosing whether he will sue the railroad company for damages for a personal injury sustained or accept the benefits of the relief department, of which he was a member, and he will not be excused on the ground of want of knowledge, where he has had the opportunity to inform himself. *Ibid.*

4. *Deeds and Conveyances—Privy Examination—Purchaser—Notice—Fraud—Burden of Proof.*—The presence and undue influence of the husband at the ceremony of privy examina-

FRAUD AND MISTAKE—*Continued.*

tion would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. *Brite v. Penny,* 110.

5. *Deeds and Conveyances—Fraud—Sale of Stock—Mortgages—Misrepresentations—Evidence—Questions for Jury.*—Evidence to set aside for fraud a mortgage deed given to the defendant by plaintiff to secure money with which to purchase stock the defendant was offering for sale examined and held to be sufficient for submission to the jury. *Ibid.*

6. *Principal and Agent—Corporations—Officers—Fraud—Corporate Acts—Evidence.*—A corporation dealing in stock is fixed with notice of a fraudulent transaction induced by its president, secretary, treasurer, and owner of nearly its whole stock, in which a large profit in the sale of the stock has been realized in the usual business channels of the company, the stock sold having been listed with the corporation for sale; and the transaction complained of will be deemed, in the absence of evidence to the contrary, to have been done in behalf of the corporation and not of the officer who consummated it in his individual capacity. *Ibid.*

7. *Homestead—Ownership and Occupation—Deeds and Conveyances—Fraud.*—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them (Revisal, secs. 961-963), and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. Revisal, sec. 686, has no application. *Sash Co. v. Parker*, 153 N. C., 130, cited and distinguished. *Rose v. Bryan*, 173.

8. *Railroads—Relief Departments—Contract—Rules and Regulations—Decisions of Department—Collateral Attack—Fraud.* The decision of the advisory board of a railroad company's relief department rendered on appeal to it by its member from the decision of the superintendent that he had sufficiently recovered of a sickness, not claimed through negligent act of the defendant, to resume work and cause the cessation of the benefits he had been receiving, cannot be collaterally attacked in an action brought in the courts, when rendered in good faith and in the absence of oppression or fraud. *Nelson v. R. R.*, 194.

9. *Divorce—Alimony Pendente Lite—Removing Property—Fraud.* An order allowing the wife alimony *pendente lite* in her action

FRAUD AND MISTAKE—*Continued.*

for divorce *a mensa*, on facts within the six months, will not be disturbed on appeal when it appears from findings of fact by the judge of the lower court, upon sufficient affidavits, and which will entitle the plaintiff to divorce if established, that the defendant is attempting to remove from the State, and to dispose of his property and remove it from the State, whereby the plaintiff may be disappointed of her alimony. Revisal, secs. 1562, 1563, 1566. *Ibid.*

10. *Principal and Agent—Fraud—Misappropriation of Funds—Cash Transactions—Evidence—Directing Verdict.*—Upon an issue in an action brought by the principal against his agent for embezzlement, or wrongful conversion and fraudulent misapplication of the proceeds from the sale of the plaintiff's stock, it is proper for the trial judge to direct a verdict in defendant's favor where all the evidence, both of plaintiff and defendants, tends to show that the defendants, though instructed to sell for cash, could not do so, and sold the stock for stock in another corporation in part and accepted for the balance cash orders on the corporation issuing the stock, this being deemed by them best for the interest of the principal under the circumstances, and they having received no benefit from the transaction. *Osborne v. Durham*, 262.

11. *Same—Worthless Stock—Measure of Damages.*—An agent acting for the interest of his principal in the sale of stock in a corporation which turned out to be insolvent, in violation of an understanding between them that the sale was to be for cash, is not liable to the principal for the cash he was instructed to receive therefor when it appears that the stock could not be sold for cash, and that, acting for the principal as he deemed for his best interest under the circumstances, he took in payment for the stock a promissory note for the face value of the stock, which, without the agent's fault, proved to be worthless, the damages recoverable, at most, being confined to the value of the stock the agent was instructed to sell, which in this case turned out to be valueless. *Ibid.*

12. *Same—Notice—Waiver.*—An owner of stock in a corporation, which subsequently proved to be valueless, requested D, the secretary of the corporation, and W, who had charge of the certificates, to sell it for him, which they undertook to do, with the understanding that the transaction was to be for cash. It proved that cash could not be obtained, and acting for the best interests of the principal, the agents negotiated

FRAUD AND MISTAKE—*Continued.*

a sale, which resulted in D giving his note for the full face value of the stock and taking a transfer of the certificates to himself, upon which the plaintiff still owed a large balance. The note thus taken was sent to the principal, who, after the corporation had gone into a receiver's hands, instructed the agent to prove his claim against it, which he did. Thereafter he instituted this action upon the note, after the maker had become insolvent, against him and the other agent, alleging, as to both, excess of authority and a fraudulent misappropriation of funds, etc.: *Held*, the plaintiff could only recover upon the note, as it appeared that he was benefited by the transaction, being released from his stock subscription, and the circumstances were such as to put a prudent man upon notice that the stock had not been sold for cash, and further, that his subsequent conduct was a ratification of the act of his agents, which released them from liability. *Ibid.*

13. *Insurance—Policy—Procurement by Fraud—Waiver—Measure of Damages.*—The principles heretofore decided in *Wilson's case*, 155 N. C., 173, and that line of cases, control the decision in this case upon the questions of the procurement by false and fraudulent representations by the agent of the insurer of the taking out of a life insurance policy, or a waiver by the insured, and the measure of damages. *Groves v. Insurance Co.*, 563.

FUTURES. See Contracts. 44.

GIFTS.

7. *Gift—Delivery—Intent, Expressed or Implied.*—To sustain a valid gift of personal property there must be an actual or constructive delivery with the present intent to pass title. *Patterson v. Trust Co.*, 13.

2. *Same—Evidence—Donee's Trunk.*—In an action involving the question of a gift to a granddaughter of personalty by the grandfather, there was evidence tending to show that the grandmother had given her a trunk, always spoken of as hers and which remained at the home of the grandparents; that while the donee and her mother were visiting there, soon after her birth, the grandmother showed the grandfather a $5 gold-piece which had been given to the donee by another, whereupon the grandfather said: "Well, we will keep that up. I will keep it up. I expect to give her $5 in gold every 22d of the month for her birthday"; that he did so on several such occasions; that in the last illness of the

GIFTS—*Continued.*

grandfather he told donee's mother to move the trunk. "I want you to move it; you may move this trunk now, if you want to, or you can wait and move it after I am dead," the trunk being there present; that the grandmother died about eighteen years ago and the grandfather in 1907; that the trunk was removed after the grandfather's death, and when opened contained $1,050 in gold, only a few small clothes formerly worn by the donee, and nothing of real value of the donor's: *Held*, sufficient evidence of a gift of the $1,050 in gold. *Brewer v. Harvy*, 72 N. C., 176, cited and distinguished; *Newman v. Bost*, 122 N. C., 524, cited and applied. *Ibid.*

3. *Debtor and Creditor—Insolvency—Gifts—Improving Property of Another—Equity.*—An insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the purchase or improvement of his property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. *Michael v. Moore*, 462.

4. *Same—Husband and Wife—Contract—Fraud.*—The right of the creditors of an insolvent husband to follow his funds used in making improvements upon his wife's lands is an equitable one, and does not rest on contract, and the money so invested is regarded as a "personal fund fraudulently withdrawn from the husband's creditors." *Ibid.*

5. *Debtor and Creditor—Insolvency—Gifts—Husband and Wife—Improving Wife's Property—Fraudulent Purpose—Intent—Equity.*—The funds of an insolvent husband invested in improvements on his wife's lands, in fraud of his creditors, is not regarded in equity as being a part of his wife's property, and may be subjected by the creditors to the payment of their debts, though the husband may not have intended to defraud them, or the wife may not have known of or participated therein, if he had such intention. *Ibid.*

6. *Debtor and Creditor—Fraud—Husband and Wife—Improving the Wife's Property—Resulting Trusts.*—An insolvent husband who has put improvements on his wife's land in fraud of his creditors has no resulting trust in the land of his wife for the value of the improvement, the equity being only in favor of his creditors, who have the right to follow the fund invested for the satisfaction of their debts. *Ibid.*

7. *Execution—Debtor and Creditor—Fraud—Improving Wife's Property—Personal Property Exemption.*—When an insolvent debtor has, in fraud of the rights of his creditors, invested

GIFTS—*Continued.*

his money in improvements on his wife's lands, and such has been established in a suit by his creditors, the debtor may claim his personal property exemption from the money so invested; and when the pleadings raise this issue, the amount of the personal property exemption must first be deducted from the amount expended in making the improvements, and the clear balance will be the basis for the estimate of the amount subject to the satisfaction of debts. Whether the creditors can recover the entire sum wrongfully used in improving the property, less the exemption, or only the amount by which the property is enhanced in value, *quœre. Ibid.*

8. *Same—Appeal and Error—Pleadings—Reformation—Issues—Procedure.*—It appearing in this suit that the creditors of an insolvent defendant are entitled to have improvements put upon his wife's land with his funds subjected to the payment of their debts, from which the debtor may claim his personal property exemption were the pleadings properly drawn to present the issue, the case is remanded with direction to reform the pleadings in accordance with the principles declared, and to submit issues for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and, also the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary. *Ibid.*

GUARDS. See Negligence, 16.

HABEAS CORPUS.

1. *Reformatory — Commitment—Parent and Child—Notice—Habeas Corpus.*—When a child is placed and detained in a reformatory under order of court, without notice to the parent or giving him an opportunity to be heard, the parent may have the legality of the detention inquired into upon his petition for a writ of *habeas corpus. In re Watson*, 341.

2. *Same—Requisites.*—Upon the parent's petition for a writ of *habeas corpus* for his child detained in a reformatory under an order of court, he must show that he has applied to the authorities in charge of his child for his release, and that he was, at the time of the commitment, and still is, a fit and proper person to have the care of the child. *Ibid.*

3. *Reformatory—Commitment—Irregularities—Habeas Corpus.*—Mere irregularity in the order of commitment by the court of a child to a proper reformatory will not entitle the child to a discharge upon the suing out of a writ of *habeas corpus. Ibid.*

HABEAS CORPUS—*Continued.*

4. *Same—Age of Child—Parent and Child—Notice—Investigation—Corrections.*—Upon petition for *habeas corpus* by the father for the unlawful detention of his child committed to a reformatory by the court, it is proper for the judge upon the hearing to inquire into the age of the child when the court's record is silent thereon. The order of the committing magistrate should include a finding as to notice and of the age of the child, and show that it is made after investigation and because it is for the best interests of the child, and it is not error for this to be done at the hearing of the writ before judgment then rendered. *Ibid.*

5. *Habeas Corpus—Custody of Child—Controlling Considerations.* Upon proceedings in *habeas corpus* by a father for the possession of his child in the custody of its mother, the mother's possession will not be disturbed if it appears that therein the physical, moral, and spiritual welfare of the child will be the better preserved. *In re Alderman*, 507.

6. *Habeas Corpus—Custody of Child.*—After a decree of divorce in another State awarding the care of the child of the marriage to the mother, the mother and child became citizens and residents of North Carolina, and while so residing the father brought proceedings here in *habeas corpus* for the custody of the child, which was denied. The father then contended that according to the decree of divorcement he was entitled to visit the child, etc.: *Held*, the decree relied upon was not subject to this interpretation; but, if otherwise, it would not have extraterritorial effect, under the full faith and credit clause of the Federal Constitution, beyond the State wherein it was rendered, so as to affect the inherent power of this State in awarding the custody of the child, which had become domiciled here. *Ibid.*

7. *Rape—Assault—Habeas Corpus.*—The prisoner was convicted and sentenced to the county jail for a term of two years and assigned to work on the public roads under the provisions of Revisal, sec. 3620, for assaulting a woman. After submitting to his sentence and serving thirty days of it, he sued out a writ of *habeas corpus*, claiming that the sentence was excessive, on the ground that the bill of indictment had not alleged that he was more than eighteen years of age at the time of the commission of the offense, and therefore, having worked out his lawful sentence, he should be discharged. The Court construes together Revisal, sec. 1427, relating to the jurisdiction of courts of justices of the peace in their counties, when no deadly weapon is used; section

HABEAS CORPUS—*Continued.*

3268, providing that "on a trial of any person for rape, when the crime charged shall include an assault upon the person," and there is a conviction of the less offense, "the court shall have power to imprison the defendant, if found guilty of an assault, for any term now allowed in cases of conviction when the indictment was originally for an assault of like character," and said section 3620, and holds that, upon conviction of a simple assault and battery upon a woman, without alleging an intent to commit rape, the prisoner, over the age of eighteen years, can be punished at the discretion of the court, without any allegation in the bill as to his age, it being a matter for him to show, if the fact existed, that he was not over the age specified, which, if proven, would except him from the general provisions of section 3620. *S. v. Smith*, 578.

HARMLESS ERROR. See Evidence; Instructions, 8; Appeal and Error, 2.

1. *Objections and Exceptions — Former Testimony — Harmless Error.*—When objection is made to the admissibility of evidence theretofore testified by the witness, without objection, the error in admitting it, if any committed, is without prejudice to the objecting party, and harmless. *Young v. R. R.*, 74.

2. *Divorce, Absolute—Adultery of Wife—Abandonment by Husband—Harmless Error—Instructions.*—In an action for absolute divorce brought by the husband on the ground of the wife's adultery, a finding by the jury that before the time of the adultery the plaintiff had maliciously turned his wife out of doors, does not render harmless an instruction erroneously imposing upon the plaintiff the burden of showing the act of the wife's adultery by "clear, strong, and convincing proof." *Ellett v. Ellett*, 161.

3. *Evidence—Interest in Suit—Harmless Error.*—The son claiming title to lands under a deed from his father registered subsequently to the filing of a complaint operating as a *lis pendens*, in an action involving the title of his father, was asked on examination if he was willing to stand or fall with his father in the suit: *Held*, the question was competent as tending to show his interest, but was rendered immaterial by his answer, "I don't know whether I understand you." *Simmons v. Fleming*, 389.

4. *Evidence—"Best" or Primary Rule—Book Entries—Parol Evidence—Collateral Matters—Competency—Harmless Error—Appeal and Error.*—In an action against the landlord and

HARMLESS ERROR—*Continued.*

tenant for fertilizers furnished to the latter to make a crop on the leased lands of the former, seeking to hold the landlord answerable on his promise to "see" that the fertilizers were paid for, testimony of a witness for the plaintiff that the fertilizers were charged to both defendants, is competent: (1) The best or primary rule does not apply, for the book entries were not directly involved in the issue, and were not required to be in writing by the statute of frauds; (2) it was irrelevant as to the tenant, and therefore harmless, and not having been objected to by the landlord, it is not reviewable on appeal as to him. *Whitehurst v. Padgett*, 424.

5. *Appeal and Error—Objections and Exceptions—Harmless as to One Defendant.*—When there are two or more defendants and an exception to the admissibility of evidence is taken so that it does not appear by which one, it will not be held reversible error on appeal when it is harmless as to one of them. (Rule 27, 140 N. C., 495.) *Ibid.*

6. *Evidence—Collateral Matters—Harmless Error.*—Testimony of a witness who had been convicted of receiving property which defendant was being tried for stealing, as to the contents of a letter he had written the sheriff, without producing the letter, to the effect that he had not stolen the mule, did not tend to prove anything harmful to the defendant, and being collateral to the issue, its admission was not error. *S. v. Neville*, 591.

7. *Instructions — Evidence—Accomplice—Evidence, Weight of—Harmless Error.*—It was not prejudicial to defendant for the judge, in his instructions to the jury, to refer to a statement made by the solicitor that he would not ask a conviction of the defendant for larceny upon the unsupported testimony of his confederate, and, besides, a conviction could have been had upon the unsupported evidence of the accomplice, if the jury found that he had told the truth. *Ibid.*

HEALTH. See Cities and Towns, 20.

HEARSAY. See Evidence, 47.

HIGHWAYS.

1. *Public Highways — Motor Vehicles — Operation—Declaratory Statutes—Interpretation.*—The Laws of 1909, ch. 445, requiring a person operating a motor vehicle "to slow down to a speed not exceeding eight miles an hour and give reasonable warning of its approach and use every reasonable precau-

HIGHWAYS—*Continued.*

tion to insure the safety of" a horse being ridden or driven, etc., upon the highway upon which the motor is being driven, etc., with the exception of establishing a speed limit, is to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. *Gaskins v. Hancock*, 156 N. C., 56; *Tudor v. Bowen*, 152 N. C., 441, cited and applied. *Curry v. Fleer*, 16.

2. *Same—Requirements.*—The maximum speed limit of eight miles an hour for the running of motor vehicles upon the highways in approaching horses being ridden or driven thereon, etc., prescribed by the Laws of 1909, ch. 445, does not contemplate or intend that the specified limit is always permissible; for one driving a machine of this character is charged with notice of things which he observes or could observe in the exercise of proper care, having regard to the nature of the vehicle he is operating and its tendency to frighten animals; and not infrequently it may become his duty to move at a much slower speed, or stop altogether if conditions so require. *Ibid.*

3. *Same—Negligence—Evidence—Nonsuit.*—In an action for damages for personal injury received by reason of the team plaintiff was driving becoming frightened from a motor vehicle approaching from the rear, there was evidence tending to show that the speed of the automobile greatly exceeded the limit prescribed by the Laws of 1909, ch. 445, and that the machine was upon the plaintiff's team without adequate warning and without giving him "any chance to hold on to his horses": *Held*, sufficient to go to the jury upon the question of defendant's actionable negligence, not so much and of itself that the speed limit was exceeded, but tending to show the defendant's negligence in not doing what the circumstances reasonably required for the plaintiff's safety; and upon conflicting evidence, a motion to nonsuit should be denied. *Ibid.*

4. *Cities and Towns—Highways—Streets—Abutting Owner—Negligence—Damages.*—As a rule, the abutting owner may not recover damages in his action against a municipality for diminution in the value of his property caused by a duly authorized change of grade in an established street, except when the work has been done in an unskillful or negligent manner, so as to proximately cause the damages claimed. *Earnhardt v. Commissioners*, 234.

HIGHWAYS—*Continued.*

5. *Cities and Towns — Streets — Evidence—Nonsuit—Statute of Limitations—Harmless Error.*—In this case damages are recoverable by plaintiff for diminution in the value of his property abutting on the street caused by the city's negligent construction in making authorized changes, and the error committed in the lower court in sustaining a nonsuit upon the evidence is adjudged harmless by reason of the statute of limitations having run against plaintiff's cause of action. *Ibid.*

6. *Cities and Towns—Streets—Negligence—Abutting Owner—Permanent Damages.*—The damages awarded in an action against a city to an abutting owner by reason of a faulty construction or work in changing the grade of a street by the proper officers of a city are permanent, and cover those which are past, present, and prospective. *Ibid.*

7. *Same — Statute of Limitations — Pleadings — Evidence.*—The statute of limitation of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred. *Ibid.*

HOLOGRAPHIC WILLS. See Wills.

HOMESTEAD. See Exemption.

HOMICIDE.

1. *Homicide—Murder in First Degree—Answer to Issues.*—Our statute on the subject peremptorily requires that before sentence of death may be pronounced, the trial jury shall determine in their verdict that the prisoner is guilty of murder in the first degree (Revisal, sec. 3271), and our trial courts should always require that verdicts in capital cases definitely and expressly state the degree of murder of which the prisoner is convicted, and the verdict should be recorded as rendered. *S. v. Murphy*, 614.

2. *Homicide—Murder in First Degree—Defense—Drunkenness—Premeditation.*—While voluntary drunkenness may not be considered as a legal excuse for a crime, the principle is not allowed to prevail where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature of the crime charged. *Ibid.*

3. *Same—Instructions—Appeal and Error.*—Our statute dividing the crime of murder into two degrees requires that for con-

HOMICIDE—*Continued.*

viction in the first degree there must be deliberation and premeditation, or a purpose to kill previously formed after weighing the matter, and when the defense properly arises under the evidence, it is reversible error for the trial judge to refuse to instruct the jury, even in cases of voluntary drunkenness, that if the prisoner was so drunk that he could not form or entertain the essential ingredients of deliberation and premeditation, as stated, they should answer the issue as to murder in the first degree in the prisoner's favor. *Ibid.*

4. *Homicide—Murder in Second Degree—Manslaughter—Defense—Drunkenness.*—The elements of deliberation and premeditation not being required as to murder in the second degree, or manslaughter, the defense of drunkenness is not an available plea thereto. *Ibid.*

5. *Murder—Premeditation—Evidence.*—Upon a trial for murder, evidence that the prisoners, a man and a woman, were heavily drinking, that they fired a gun, having procured shells for the purpose, indiscriminately at houses along the road, to the fear of the occupants and those whom they met; that the male prisoner made threats against the life of the deceased, concurred in by the woman, who afterwards identified and pointed out the deceased, whereupon the male prisoner killed him with the gun he was carrying, is sufficient, upon the question of premeditation, to sustain a verdict of murder in the first degree. *S. v. Grainger*, 628.

6. *Murder—Instructions—Collateral Matter—Prayers Refused—Substantial Compliance.*—Upon evidence tending to show that the prisoners, a man and woman, tried for murder, had been drinking heavily and were selling whiskey; that the male defendant assaulted a person with brass knucks, and afterwards unlawfully killed another person, the deceased, with a gun he was carrying, a charge of the court which clearly states for what offense the prisoners were tried, restricting the trial to that for murder, is a substantial compliance with a requested prayer for instruction, "that the prisoners were not on trial for selling whiskey nor for making an assault with the knucks as independent facts," and that the jury should not consider this evidence in arriving at their verdict. *Ibid.*

7. *Murder—Deadly Weapon—Second Degree—Presumptions—Instructions.*—The killing of a human being with a deadly weapon raises the presumption of murder in the second degree, and a request for instruction which assumes a less offense, under conflicting evidence, should be refused. *Ibid.*

HOMICIDE—*Continued.*

8. *Murder—Motive—Burden of Proof.*—The burden is not upon the State to show the motive of one aiding and abetting the committing of murder by another, when the evidence is otherwise sufficient, though the case may be strengthened by showing motive when the evidence is circumstantial. *Ibid.*

HOUSEBREAKING. See Indictments, 19, 20.

HOUSEHOLD FURNITURE. See Usury.

HUSBAND AND WIFE. See Evidence, 75; Deeds and Conveyances; Trespass, 9; Gifts, 4, 5, 6, 7.

1. *Dower—Equitable Estates—Seizin of Husband—Personalty—Trusts and Trustees—Advancements—Distribution.*—An estate in lands of a deceased husband from which his widow's dower may be assigned, whether legal or equitable, must be one of which the husband was seized. *Semble,* in this case, the will should be construed that the land be sold and the proceeds divided, and therefore the interest of the husband would be personalty; that advancement had been made to the husband of more than his share of the fund; that the trustees were to divide the fund after certain children had been made to account for advancements, and *Patton v. Patton,* 60 N. C., 574, applied. *Phifer v. Phifer,* 221.

2. *Tenants in Common—Parties—Husband and Wife—Survivorship.*—In proceedings in partition of lands by tenants in common, under allegations in the petition that "D. and I. are joint tenants, as between themselves, of an undivided one-half interest in the said lands," it appearing that they are husband and wife: *Held,* the allegations mean an estate held by entireties with the right of survivorship, and entitled them to only one share in the land, and thus both were parties in interest in the land to be partitioned. *Luther v. Luther,* 499.

HYPOTHETICAL QUESTIONS. See Questions of Law, 1.

IDENTIFICATIONS. See Evidence, 1.

IMPEACHMENT. See Evidence, 103.

IMPLIED AUTHORITY. See Master and Servant, 19, 20.

IMPROPER REMARKS. See Appeal and Error, 56.

INCEST.

Incest—Evidence—Corroboration.—Under an indictment for incest, proof of other acts of the same nature is competent in

INCEST—*Continued.*

corroboration, and for like purpose of corroboration, evidence is also competent of cruel treatment tending to show compulsion and of pertinent statements made by the witness before the trial. *S. v. Broadway*, 598.

INDEMNITY. See Insurance.

INDEPENDENT CONTRACTOR. See Contracts, 14, 15, 31, 32, 33, 34, 35, 36.

INDICTMENT.

1. *Rape—Assault with Intent—Assault on Woman—Interpretation of Statutes—Proviso—Age—Indictment—Allegations—Defense.*—By statute, Revisal, 3620, as amended by the Laws of 1911, ch. 193, the punishment for "assaults, assaults and batteries, etc.," is limited to a fine not exceeding $50 or imprisonment of thirty days in certain instances: *Provided*, among other things, that it shall not apply to an assault by a man, or by a boy over eighteen years of age, upon a woman: *Held*, it is for the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over that age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. *S. v. Smith*, 578.

2. *Rape, Assault on Woman—Intent—Allegations—Age—Indictment—Defense—Interpretation of Statutes.*—When an indictment charges an assault with the intent to commit rape, the prisoner may be convicted of an assault upon a woman (Revisal, sec. 3268); and if it is found that he was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not. Revisal, secs. 3268, 3620. *Ibid.*

3. *Assault—Indictment—Conviction of Less Offense—Issues—Punishment.*—Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. *Ibid.*

4. *Indictment—Assault—Rape—Jurisdiction Concurrent—Magistrate's Cognizance—Burden of Proof.*—It is not necessary for

INDICTMENT—*Continued.*

a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the Superior Court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission"; for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. Revisal, sec. 1427. *Ibid.*

5. *Indictment — Mutilation of Records — Tax List — Register of Deeds.*—An indictment charging that defendant "did unlawfully, willfully, and corruptly, and with fraudulent intent and purpose, take from the office of the register of deeds . . . the tax books" for a certain year, the books having been deposited in the register's office as ordered by law, and "did unlawfully, maliciously, willfully, and fraudulently obliterate, injure, and change the said tax books" for the certain year, "a record required to be kept by the register of deeds," is within the terms of Revisal, 3508. *S. v. Gouge,* 602.

6. *Same — Tax Book — Record — Indictment — Interpretation of Statutes.*—The tax book of the register of deeds is a book of records required to be kept by the register of deeds, and it falls within the meaning of Revisal, 3508, making it an indictable offense under the conditions therein stated for their obliteration, etc. *Ibid.*

7. *Same—Register of Deeds—Clerk to Board County Commissioners—Interchangeable Positions—Interpretation of Statutes.*—The register of deeds is *ex officio* clerk to the board of county commissioners (Revisal, 2666), and the two positions are not separate offices, but used interchangeably in the statute (Revisal, 5238, 5239, 5240), and it is provided (Revisal, 5237) that the tax book to be made out by the register of deeds "shall remain in the office of" the clerk of the board of commissioners, and *Held,* a charge of an unlawful, etc., obliteration of the tax books required to be kept by the register of deeds meets with the requirements in that regard of Revisal, 3508. *Ibid.*

8. *Register of Deeds—Tax Books—Township Totals—Mutilation—Indictment—Interpretation of Statutes.*—While the statute does not require the total tax for each township to be put in the tax book or record of the computation of taxes for a county, it is a customary and convenient practice, and when such has been done, a mutilation or change of the totals on the record falls within the meaning of Revisal, 3508, and is

INDICTMENT—*Continued.*

an indictable offense when its provisions have been violated; besides, objections, in this respect, relate to matters of proof and not to the sufficiency of the indictment. *Ibid.*

9. *Indictment — Tax Books — Register of Deeds — Mutilation — Township Totals — Auditor's Abstract — Parol Evidence.* — Upon a trial under an indictment of a deputy sheriff for changing the township totals of taxation for fraudulent purposes respecting a settlement thereof, testimony of a witness to the effect that the abstract which he made and sent to the Auditor was a correct copy from the tax list, and that the books now show a mutilation and change of the tax lists as to these township totals, amounting to a certain sum, which the defendant is charged with drawing from the bank of deposit for his own use, is competent, as the abstract sent the Auditor was made from unchanged items and could in no wise be affected by the alteration of the township totals. *Ibid.*

10. *Same.*—An abstract made by a witness for the State Auditor from the tax list is but a written declaration of the witness which he at one time made as to the amount of the unaltered totals, and it is not necessary that this abstract be produced under an indictment for violation of Revisal, 3508, for the witness to state the township totals therein, for he may now testify what the total was, the parties being entitled to produce the abstract in corroboration or rebuttal, as the case may be, and in this case the addition of the unaltered items was introduced, from which the jury could ascertain whether the totals were correct or not. *Ibid.*

11. *Indictment—Mutilation of Records—Tax Books—Defalcation of Sheriff—Evidence.*—Evidence that a deputy sheriff altered the township totals of taxation taken from the tax book and drew the difference in gold from the bank in order that his defalcation might not be traced to him, is simply that of a circumstance competent for what it is worth, as tending to show illegality and fraud, under indictment for violating the provisions of Revisal, 3508. *Ibid.*

12. *Same — Character Witnesses — Cross-examination.*—A deputy sheriff was indicted for unlawfully mutilating the township totals of taxation (under Revisal, 3508) made out by the register of deeds and in his office, in order to conceal his defalcation: *Held*, competent on cross-examination of defendant's witness, for him to state that he had threatened the defendant with proceedings before a Superior Court judge before he would show his books or state the amount

INDICTMENT—*Continued.*

he had paid over, and it was not objectionable as an attack on the good character of the witness by proving specific acts of misconduct. *Ibid.*

13. *Judgment—Motion in Arrest—Conviction—Indictment.*—A motion in arrest of judgment will not be allowed after conviction, for the reason that a bill of indictment charging the unlawful manufacture and sale of spirituous, etc., liquors did not state the date of the commission of the alleged offense or the county in which it had been committed. *S. v. Francis*, 612.

14. *Same—Defects in Bill.*—To sustain a motion in arrest of judgment after verdict for defects in the indictment, it must appear that the bill is so defective that a judgment cannot be pronounced upon a verdict thereunder. *Ibid.*

15. *Same—Captions of Bill.*—An omission in the caption of a bill of indictment cannot be a ground for arresting a judgment under the indictment, for the caption is not a part of the bill in this sense. *Ibid.*

16. *Judgment—Motion in Arrest—Conviction—Indictment—Allegations—Term of Court—Procedure.*—Omitting to state the term of the court in which a true bill is found is not a sufficient ground upon which to sustain a motion in arrest of judgment; especially so when from the record it appears at what term the bill was returned.

17. *Judgments—Motion in Arrest—Indictment—Allegations—Time of Offense.*—Time is not of the essence of the offense charged in a bill of indictment, and the failure of the bill to allege it is not a defect upon which the judgment will be arrested after verdict. *Ibid.*

18. *Streams—Water Supply—Pollution—Indictment—Language of Statute.*—The offense of unlawfully polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), is sufficiently charged in the indictment, when the language of the statute is followed therein. *S. v. Leeper*, 146 N. C., 655, cited and applied. *S. v. Corbin*, 619.

19. *Indictment—Housebreaking—"Felonious"—Motion in Arrest of Judgment.*—An indictment under Revisal, sec. 3333, for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal, etc.," and is not defective for the failure to allege that the

INDICTMENT—*Continued.*

breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony"; and a motion in arrest of judgment on that ground should be denied. *S. v. Goffney,* 624.

20. *Housebreaking—Act Procured—Lawful Entry—Felonious Intent.*—In order to convict of housebreaking under Revisal, sec. 3333, there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. *Ibid.*

21. *Insurance—Agents Licensed — Indictment — Interpretation of Statutes.*—The language of our statute relative to making it unlawful for one to solicit business for a foreign insurance company is, "If any person shall assume to act as an insurance agent without a license therefor, as required by law." and a bill of indictment for the offense will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise it is sufficient. *S. v. Arlington,* 640.

INJUNCTION.

Deeds and Conveyances—Timber—Injunction—Ascertainment of Size—Experts—Reference — Power of Court.—When a conveyance of lands reserved in the grantor all the timber thereon, and it appears by construction of the instrument that the trees should be of that size as of the date of the deed, it is reversible error for the court, not having found that the contention of the plaintiff was not *bona fide* (Revisal, 809), to dissolve an order restraining the cutting of the timber upon the defendant's giving bond, solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size at the date of the deed (Revisal, 809), as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. (Revisal, 519 (3).) *Kelly v. Lumber Co.,* 175.

INSOLVENCY. See Insurance, 10; Gifts, 3, 5.

INSTRUCTIONS. See Evidence, 78; Negligence, 21.

1. *Appeal and Error—Instructions — Presumptions.*—When the charge of the trial court is not set out in the record on appeal

INSTRUCTIONS—*Continued.*

it is assumed that he fully explained to the jury the significance of an issue submitted and the bearing of the evidence thereon. *Wacksmuth v. R. R.*, 34.

2. *Carriers of Goods—Negligence—Delayed Delivery—Consignee's Readiness—Issues, Relation of—Instructions.*—In an action for damages to a shipment of goods, alleging that they were caused by the failure of the carrier to transport them within a reasonable time, the first issue related to the reasonableness of the time of transportation, the second as to the injury caused thereby, and the third as to the amount of damages: *Held*, no error of the trial judge to instruct the jury in reference to the relations of the issues to each other, that if they answered the first issue "Yes," they should go to the next issue; and if they answered the second issue "Yes," they should find the damages under the third; and that if they should answer the first issue "No," they need not go further, but return their verdict. *Young v. R. R.*, 74.

3. *Carriers of Goods—Delayed Delivery—Measure of Damages—Instructions—Agreement of Counsel—Appeal and Error.*—In this action for damages alleged to have been caused by the negligence of defendant carrier in transporting a shipment of goods: *Held*, not error for the trial judge to omit to charge the jury upon the rule of the measure of damages, it appearing that the counsel for both parties had agreed on the trial, in the presence of the jury, and with the sanction of the court, that the damages should be the difference in value between the market price of the goods when delivered and the actual value of the damaged goods, should the defendant be held answerable. *Ibid.*

4. *Instructions, More Explicit — Special Requests — Practice.*—When the judge properly instructs the jury generally upon the law applicable to the issues, an exception that the charge was not full or explicit will not be considered on appeal, as, in such a case, error can only be assigned to the refusal of the judge to give proper and more explicit instructions in response to special prayers therefor. *Trollinger v. Fleer*, 81.

5. *Instructions—Requisites of Requests—Signed by Counsel—No Reason for Refusal—Record—Appeal and Error.*—Requests for special instructions must be written and signed by the attorney for the parties requesting them, and handed to the presiding judge before the commencement of the arguments to the jury, unless, in his discretion, the trial judge has granted an extension of time; and when it appears that this has not been done, it is not necessary for the record to show

INSTRUCTIONS—*Continued.*

the reason of the trial judge in not giving them, and an exception upon that ground will not be considered on appeal. *Pritchett v. R. R.*, 88.

6. *Instructions, Correct in Part—Appeal and Error.*—A prayer for special instructions which in part correctly states a proposition of law, and incorrectly applies it to the matters in evidence, is improper, and should be refused. *Fisher v. Commissioners*, 150.

7. *Divorce, Absolute—Adultery of Wife—Abandonment by Husband—Harmless Error—Instructions.*—In an action for absolute divorce brought by the husband on the ground of the wife's adultery, a finding by the jury that before the time of the adultery the plaintiff had maliciously turned his wife out of doors, does not render harmless an instruction erroneously imposing upon the plaintiff the burden of showing the act of the wife's adultery by "clear, strong, and convincing proof." *Ellett v. Ellett*, 161.

8. *[illegible]—Harmless Error.*—The refusal by the trial judge to give a special prayer for instruction requested, excluding from their consideration damages to the health or person of the plaintiff, is not held for reversible error in an action for damages to his property caused by the negligent blasting of rock by the defendant, when in which the judge confines the recovery to injury to property, though as a cautionary measure it might have been given with propriety. *Arthur v. Henry*, 393.

9. *Instructions, Incomplete—Appeal and Error.*—An incomplete charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is reversible error. *Patterson v. Nichols*, 406.

10. *Holographic Wills—Evidence—Deposit—Instructions.*—Upon the evidence in this case it was proper for the trial judge to instruct the jury that if they found that the deceased placed the script in an envelope, with certain policies of life insurance and deposited them in a drawer of the table in the hall of his home, intending that it should be his will, the requirements of the statute were fully observed. *In re Jenkins*, 429.

11. *[illegible]—Appeal and Error—Absence of Evidence.*—An instruction by the Superior Court that if the jury find from the evidence the existence of certain facts to answer an issue in a certain way, cannot be reviewed in the Supreme Court when the evidence referred to is not disclosed by the record. *[illegible] v. Taylor*, [illegible].

INSTRUCTIONS—*Continued.*

12. *Instructions—Presumed Correct.*—An instruction given by the trial court to the jury is presumed to be correct, nothing appearing of record to the contrary. *Ibid.*

13. *Negligence — Instructions — Confusing — Appeal and Error.*— When damages are sought for a personal injury alleged to have been negligently inflicted, a request for special instruction on the question of contributory negligence is confusing and should be refused, which directs an affirmative answer if the jury found as a fact that the plaintiff "was negligent in any degree." *Brazille v. Barytes Co.*, 454.

14. *Instructions—How Construed—Appeal and Error.*—When, construed as a whole, the charge of the trial judge is correct, a fragmentary part objected to will not be held reversible error. *Ibid.*

15. *Negligence—Electricity—Dangerous Instrumentalities—Fellow-servant—Instructions—Appeal and Error.*—When there is evidence tending to show that the plaintiff's intestate was killed by the negligence of the defendant in failing to furnish him a proper appliance for stretching its telegraph wires over and in close proximity to heavily charged wires of another company furnishing electricity for light and power purposes, or in providing a guard wire to prevent contact between the telegraph wire he was handling and the live wire of the other corporation, which caused the injury, a modification of a prayer for special instruction upon the application of the doctrine of the liability of the defendant for the negligence of a fellow-servant is not material, when it appears that the trial judge instructed the jury that if the injury was proximately caused by the negligent act of the fellow-servant the plaintiff could not recover. *Hicks v. Telegraph Co.*, 519.

16. *Instructions—Evidence.*—A prayer for instruction relating to the contributory negligence of the father, unsupported by the evidence, was properly refused. *Ferrell v. Cotton Mills*, 528.

17. *Instructions Confusing — Contributory Negligence—Technical Correctness—Explanation—Practice.*—An instruction, in this case, *Held* technically correct, but tending to confuse and mislead juries, that if the jury "find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer" affirmatively the issue as to contributory negligence; and it is the better practice for the trial judge to adhere to the practice which requires them to explain the conduct of

INSTRUCTIONS—*Continued.*

the plaintiff which will amount to negligence, and instruct them that if there is negligence which is the real cause of the injury, he cannot recover. *Worley v. Logging Co.*, 490.

18. *Pleadings—Contributory Negligence—Unsafe Conditions—Appliances—Defense—Instructions.*—The defendant being sued by its engineer for damages alleged to have been inflicted on him in a derailment upon an unsafe track and by the use of unsafe appliances, alleged only in its answer, by way of defense, that the plaintiff's injury was caused by his negligently operating or running the train: *Held*, as there was no evidence of negligence as alleged, the defendant's prayers for instruction upon contributory negligence were properly refused. *Ibid.*

19. *Measure of Damages—Mental Power—Evidence—Instructions.* In an action to recover damages for a personal injury, an instruction is erroneous which tells the jury they may consider under certain conditions and phases of the evidence, as an element of damages, the loss by plaintiff of his mental powers, etc., when there is no suggestion, at any time, that the plaintiff was unconscious, or that his sufferings were of that character; and in this case a new trial is ordered, confined to the issue of damages. *Ibid.*

20. *Appeal and Error—Objections and Exceptions—Instructions—Practice.*—Exceptions to the charge may be taken for the first time when the case on appeal is settled, and they should point out the parts of the charge to which exceptions are taken. *Ibid.*

21. *Appeal and Error—"Recent Possession"—Instructions—Omission to Charge.*—When error on appeal is assigned upon the ground that the judge, on a trial for larceny, omitted to charge on the principles of law applicable to the defendant's recent possession, it is necessary for the court to examine the evidence of the State and the defendant, when the question turns upon the nature and legal significance of it; and if it tends either to acquit or convict without the necessity of any special consideration of the probative force of recent possession or of evidence by circumstances, the omission to charge thereon is not error, and a full and explicit instruction upon the doctrine of reasonable doubt is sufficient in the absence of a prayer for more specific instructions. *S. v. Neville*, 591.

22. *Instructions—Evidence—Accomplice—Evidence, Weight of—Harmless Error.*—It was not prejudicial to defendant for the judge, in his instructions to the jury, to refer to a state-

INSTRUCTIONS—*Continued.*

ment made by the solicitor that he would not ask a conviction for larceny of the defendant upon the unsupported testimony of his confederate, and, besides, a conviction could have been had upon the unsupported evidence of the accomplice, if the jury found that he had told the truth. *Ibid.*

23. *Murder—Instructions—Collateral Matter—Prayers Refused—Substantial Compliance.*—Upon evidence tending to show that the prisoners, a man and woman, tried for murder, had been drinking heavily and were selling whiskey; that the male defendant assaulted a person with brass knucks, and afterwards unlawfully killed another person, the deceased, with a gun he was carrying, a charge of the court which clearly states for what offense the prisoners were tried, restricting the trial to that for murder, is a substantial compliance with a requested prayer for instruction, "that the prisoners were not on trial for selling whiskey nor for making an assault with the knucks as independent facts," and that the jury should not consider this evidence in arriving at their verdict. *S. v. Grainger*, 628.

24. *Murder—Deadly Weapon—Second Degree—Presumptions—Instructions.*—The killing of a human being with a deadly weapon raises the presumption of murder in the second degree, and a request for instruction which assumes a less offense, under conflicting evidence, should be refused. *Ibid.*

25. *Instructions—Contentions Stated by Judge—Appeal and Error.* It is the duty of the court to state the contentions of the parties which are supported by the evidence, and his thus doing so is not error. *Ibid.*

INSURABLE INTEREST. See Insurance, 1.

INSURANCE.

1. *Insurance—Assignment of Policy—Good Faith—Insurable Interest.*—An insured who had taken out on his own life a policy of life insurance, payable to himself, and who had paid the first and subsequent premiums thereon, may, not as a cloak or cover for a wagering transaction or as a mere speculation, but in good faith and for a valuable consideration, make a valid assignment of the policy, which will be binding upon the insurance company, to a person having no insurable interest in his life; and the person to whom the policy has thus been assigned may recover thereon of the insurer. *Hardy v. Insurance Co.*, 152 N. C., 286; *s. c.*, 154 N. C., 430, cited and approved as settling this doctrine. *Johnson v. Insurance Co.*, 106.

INSURANCE—*Continued.*

2. *Insurance—Credit Bonds—Contracts—Evidence.*—In this action brought upon a contract to indemnify against loss by giving credit, the application bond, and Schedule A, to which the bond refers, are construed as a contract of insurance between the parties. *Grocery Co. v. Casualty Co.*, 116.

3. *Insurance — Credit Bond—Contracts—Construction—Intent.*—A contract indemnifying a merchant against a credit loss should be construed more strongly against the insurer, and ambiguities should be reconciled, if possible, by gathering the intent of the parties from the whole instrument; and if the particular clause requring interpretation cannot be thus brought into harmony with the rest of the contract touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured. *Ibid.*

4. *Same—Ambiguity—Void Provisions.*—When in an application by a merchant for a bond of indemnity for credit losses it is provided, "Experience shall be the basis for credit under the bond as specified on Schedule A," with a specified account limit, and it is expressly stipulated in the bond that Schedule A shall describe the class of customers to be covered by the bond, which specifies three classes of debtors, which may be termed old customers, new customers, and those who are solvent, the fact that nothing is said in this schedule about insolvency at the time of the execution of the bond, when defining old and new customers, and that it is expressly provided that as to "outstandings" only those of the debtors who were solvent when the bond was executed were insured, indicates clearly the intent to insure the debts of old and new customers, created after the execution of the bond, although insolvent, provided the credit extended was based upon the experience of the insured; and an ambiguity in a different section of the bond, which is repugnant to the intent gathered from the whole instrument, that experience is to be the basis of credit extended, is void. *Ibid.*

5. *Insurance — Credit Bond—Intent—Construction.*—An application for a bond of indemnity by a merchant for credit losses provided that credits covered by the bond were to be extended to customers upon the basis of experience, with limitation as to amount, etc., as contained in Schedule A of the bond accordingly issued. Paragraph 12, subsection B, of the bond, provided that it covered "the insolvency, etc., in this subsection" occurring between the date of the execution and termination of the bond. When construed in connection with the other parts of the bond under consideration in this

INSURANCE—*Continued.*

case: *Held,* that experience being the basis of credit and that the debts insured are those covered by Schedule A, the intent of subsection B of paragraph 12 was to provide evidences of liability that would be satisfactory for small claims that did not exceed $150, which were divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond. *Ibid.*

6. *Insurance — Premiums—Notes—Extension—Parol Evidence—Payment.*—When upon its face in express terms a note given by an insurer for a premium due on his life insurance policy declares that the policy is void if the note be not paid when due, the position is not available that the note was given for the payment of the premium and not for an extension of time within which to pay it. *Sexton v. Insurance Co.*, 142.

7. *Insurance—Premiums—Receipts—Possession — Payment—Evidence.*—When a note is given for a premium due on a life insurance policy and attached to it is a paper-writing purporting to be a receipt for the premium, the paper-writing attached to the note is not evidence that the note was given and received as a payment of the premium, when it is undelivered and in the possession of the insurance company, and produced at the trial upon legal notice to do so. *Ibid.*

8. *Insurance—Indemnity—Contracts—Right of Action—Damages Sustained.*—When a contract of indemnity is clearly against loss or damage, no action will lie in favor of the insured until some damage has been sustained, either by the payment of the whole or some part of an employee's claim. *Clark v. Bonsal*, 270.

9. *Same—Judgment.*—If the stipulation in a contract of indemnity is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs, or, in some instances, when the amount and rightfulness of the claim has been established by judgment of some court having jurisdiction, this according to the terms of the policy. *Ibid.*

10. *Same—Pleadings—Assignments — Insolvency.*—When the contract of indemnity is taken out by the insured and appears to be for his protection, it is treated and dealt with as an asset of the insured employer, and in the absence of an assignment from him or allegation of insolvency, etc., an employee has no interest therein upon which he may proceed directly against the insurer for damages for a personal injury received by him, which was covered by the policy. *Ibid.*

INSURANCE—*Continued.*

11. *Same—Equity.*—An injured employee may not proceed originally against an indemnity company which has insured the employer against loss from such injury, in the absence of an assignment by the employer of the policy to him, except by attachment or bill in the nature of an equitable *fi. fa.*, or some action in the nature of final process incident to the bankruptcy or insolvency of the insured. *Ibid.*

12. *Same—Parties.*—An ordinary indemnity contract against liability for injury to the employees of the insured, as the one sued on here, is not for the benefit of the employee, either in its express terms or in its underlying purpose, but for the indemnity and protection of the employer against unexpected and uncertain demands, and the rights arising under the contract are his property, and actions to recover same are under his control. *Ibid.*

13. *Same—Pleadings—Demurrer.*—A complaint which joins an indemnity company as a party defendant in an action for personal injuries sustained, and which was covered in the policy contract, sets forth no cause of action against the indemnity company, which alleges a contract between the defendants for the protection of the employer alone, without allegation of an assignment to the suing employee or insolvency of the employer, and a demurrer on the ground of misjoinder of parties should be sustained as to the defendant indemnity company. *Ibid.*

14. *Insurance—"Adjoining and Communicating Additions"—Property Insured—Parol Evidence—Interpretation of Policy.*—In an action by a sanitarium company for loss under a policy of fire insurance on its "two-story frame metal-roof building, with adjoining and communicating additions, etc.," recovery was resisted on the ground that the policy did not cover a cottage about 15 or 20 feet from the main building, as it was not an "adjoining or communicating addition": *Held,* (1) evidence was competent to fit the cottage to the description in the policy which tended to show that the cottages contained rooms for the patients of the sanitarium who were, under certain circumstances, treated in these rooms; that all were under the same management and that there were call-bells from each of these rooms which communicated with the main building, and that all had the same system of sewerage and water pipes; (2) that the cottages would come within the descriptive terms of the policy as a matter of law; (3) that testimony that the cottages were insured in separate and

INSURANCE—*Continued.*

distinct amounts in another policy would relate to the weight of the testimony and not to its competency. *Sanitarium Co. v. Insurance Co.*, 551.

15. *Insurance—Policy—Procurement by Fraud—Waiver—Measure of Damages.*—The principles heretofore decided in *Wilson's case*, 155 N. C., 173, and that line of cases, control the decision in this case upon the questions of the procurement by false and fraudulent representations by the agent of the insurer of the taking out of a life insurance policy, or a waiver by the insured, and the measure of damages. *Groves v. Insurance Co.*, 563.

16. *Insurance—Interpretation of Statutes.*—Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, real or pretended, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with. *S. v. Arlington*, 640.

17. *Insurance—Foreign Corporations—Local Branches—Sick and Death Benefits—License to Agents—Insurance Commissioner—Interpretation of Statutes.*—A corporation organized with a home office in another State, with executory supervision and control of branch organizations, in some respects local in their character, with provision in the by-laws that the local branch may pay sick and death benefits to their members, the local organizations paying certain fees to the home office for new and old members, comes within the intent and meaning of our insurance laws, requiring that all insurance companies must be licensed and supervised by the Insurance Commissioner (Revisal, sec. 4691); that every agent must pay a license tax, etc. (Revisal, sec. 4706); that a general or district agent or organizer or local or canvassing agent must pay a certain tax as to each, section 4715 (3). *Ibid.*

18. *Insurance Companies—Foreign Corporations—Fraternal Orders—Interpretation of Statutes.*—Fraternal insurance orders are such as make provision for sick and death benefits (Revisal, 4794, *et seq.*), and they are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not required to make the deposit or have the paid-up capital required of other companies. *Ibid.*

19. *Insurance—Foreign Corporations—Fraternal Orders—Definition—Interpretation of Statutes.*—One who without license from the Insurance Commissioner, advertises and represents that a certain order operating from another State "was

INSURANCE—*Continued.*

there"; that he was the representative; that the order paid accident and death benefits; that he solicited people to "come at once and join"; that he gave a membership receipt to those who applied and paid the membership price, is an insurance agent within the purview of the statute, and indictable thereunder for soliciting insurance in a company not complying with our laws and for not having been licensed by the Insurance Commissioner to solicit business. *Ibid.*

20. *Insurance — Agents Licensed — Indictment—Interpretation of Statutes.*—The language of our statute relative to making it unlawful for one to solicit business for a foreign insurance company is, "If any person shall assume to act as an insurance agent without a license therefor, as required by law," and a bill of indictment for the offense will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise it is sufficient. *Ibid.*

21. *Insurance—Foreign Corporations—Control of Home Office—License—Option to Insure—Local Branches.*—When it appears that a foreign fraternal order is doing business in this State by organizing local branches, a conviction can be had if, under its constitution, its local branches, having the insurance features of death and sick benefits, have been organized in all portions of the country, doing business under by-laws furnished by the home office, and in its scheme of government the authority of the home office is so absolute and all-pervading that it must be judged and have its status fixed by what it sanctions and approves; and this position may not be properly altered or affected because some particular local branch does or does not adopt the insurance feature. *Ibid.*

22. *Insurance — Unincorporated Companies — Interpretation of Statutes.*—Our statutes relating to the regulation and supervision of insurance companies by the Insurance Commissioner uses the words insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. *Ibid.*

INSURANCE COMMISSIONER. See Insurance, 17.

INSURERS. See Carriers of Goods, 5, 6, 7, 8, 9, 10, 11.

INTENT. See Contracts, 26, 27; Gifts, 1, 2, 5; Insurance, 3, 4, 5; Slander, 1; Evidence, 48; Executor and Administrator, 5.

INTERPRETATION. See Contracts; Wills; Deeds and Conveyances; Penalty Statutes; Pleadings, 17; Appeal and Error, 54.

INTERPRETATION OF STATUTES. See Motions, 9; Process, 3; Insurance; Statutes; Penalty Statutes.

1. *Public Highways — Motor Vehicles — Operation—Declaratory Statutes—Interpretation.*—The Laws of 1909, ch. 445, requiring a person operating a motor vehicle "to slow down to a speed not exceeding eight miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of" a horse being ridden or driven, etc., upon the highway upon which the motor is being driven, etc., with the exception of establishing a speed limit, is to a great extent an embodiment of general principles of law applicable to motor vehicles when operated on the highway and in places where their use is likely to be a source of danger to others. *Gaskins v. Hancock*, 156 N. C., 56; *Tudor v. Bowen*, 152 N. C., 441, cited and applied. *Curry v. Fleer*, 16.

2. *Railroads — Relief Department—Benefits—Voluntary Acceptance—Public Policy—Interpretation of Statutes.*—A contract between a railroad company and its employee giving the latter the choice, after the injury has been received, of maintaining his action for damages for personal injuries inflicted by the former or relinquishing his right of action by voluntarily accepting the benefits of the relief department, if he is a member, is not against public policy or in contravention of the statutes invalidating agreements between employer and employee which exempt the employer from its liability for negligence. *King v. R. R.*, 44.

3. *Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.*—When a plaintiff has sued in the State court and has pleaded and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act. *Horton v. R. R.*, 146.

4. *Liens—Material Men—Identity of Property—Interpretation of Statutes.*—A line of poles, wires, and appliances carrying electricity from a dynamo to a manufacturing plant for power and lighting purposes retains its identity and therefore is not "material furnished" within the meaning of Revisal, 2016, so as to entitle the vendor to a lien upon the plant, for in such instances the vendor could retain title under a con-

INTERPRETATION OF STATUTES—*Continued.*

ditional sale or by a mortgage lien which would protect his debt. *Pipe Co. v. Howland*, 111 N. C., 615, cited and distinguished. *Fulp v. Power Co.*, 154.

5. *Parties — Contracts — Assignment—Persons Interested—Interpretation of Statutes.*—The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence that he has assigned the contract to a third person, not a party to the action, and has no further interest therein. Revisal, sec. 400. *Vaughan v. Moseley*, 156.

6. *Divorce, Absolute—Wife's Adultery—Abandonment—Interpretation of Statutes.*—Under our statutes, under certain conditions, an agreement for separation executed by the husband and wife is valid (Revisal, sec. 2116); and when abandoned by her husband, the wife may sue for support of herself and children without seeking a divorce (Revisal, sec. 1292). Hence, the doctrine laid down by our older decisions does not in reason apply, which rendered the adulterous conduct of the wife after abandonment no ground for divorce, especially, as in this case, where the husband under an agreement of separation was supporting his wife at the time of her alleged acts of adultery. *Ellett v. Ellett*, 161.

7. *Trespass—Timber Trees—Double Damages—Certain Counties—Interpretation of Statutes.*—In order to recover double damages for trespass and the unlawful cutting of timber trees in certain counties, Laws of 1907, ch. 320, the act complained of must come within the meaning of the words therein employed, *i. e.*, "without the consent of the owner (of the lands), with intent to convert to his (the trespasser's) own use," which means an intent to deprive the owner of the use, and to appropriate to the use of the taker, and was intended to cover a trespass where there was no *bona fide* claim of right, committed under circumstances indicating a purpose to prevent the true owner from asserting his right. *Lumber Co. v. Hayes*, 333.

8. *Same—Special Pleas.*—It is not necessary to specially plead the Laws of 1907, ch. 320, or refer to it in the complaint, when the act of the trespass and unlawful cutting of timber entitles the one upon whose lands the trespass is committed in the counties therein named to recover double the amount of the damages proved. *Ibid.*

9. *Legislative Enactments—Constitutional Law—Interpretation—Courts.*—In passing upon the constitutionality of a legisla-

INTERPRETATION OF STATUTES—*Continued.*

tive enactment it is the duty of the court to declare the law as expressed by the people in the Constitution, having respectful regard for the coördinate department of the Government in the Legislature, the agent of the people under their Constitution, resolving all reasonable doubts in favor of its acts. *In re Watson*, 340.

10. *Same — Minors—Reformatory—Parens Patriæ.*—The Legislature has no unlimited and arbitrary power over minors in respect to detaining them in reformatories, and enactments relating thereto are justified only upon the idea that the child is without parental care, and that his environments are such that he may reach manhood without restraint or training under corrupting influences, unless the State, as *parens patriæ*, performs the duty which devolves primarily upon the parent. *Ibid.*

11. *Same—Vagrants.*—The Legislature has constitutional authority to establish reformatories, "where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed," and therein youthful criminals may be detained and reformed before they become hardened in crime; and the legislative power in this respect exists, in the absence of a prohibition in the Constitution, though not expressly given. *Ibid.*

12. *Same—Bill of Rights.*—The punishment for vagrancy cannot exceed thirty days under our statute, and a legislative act which provides for a longer detention of a child in a reformatory for that offense, if merely for the purpose of punishment, would be violative of section 14 of the Bill of Rights. *Ibid.*

13. *Reformatory—"Conviction"—Sentence—Punishment—Interpretation of Statutes.*—The act creating the Stonewall Jackson Training School is "for the training and moral development of the criminally delinquent children of the State," and the superintendent is "intrusted with the authority for correcting and punishing any inmate thereof to the same extent as a parent may, under the law, impose upon his own child," and in its general scheme and purposes is for the benefit of a child therein detained. Hence, the provisions in the act that the child committed thereto must be "convicted" and "sentenced" by the court, construing the act as a whole, does not mean that detention therein is an imprisonment as a punishment for a crime, but that the "conviction" is merely evidence that the child needs the care and nurture of the State, and that the sentence is an order of detention. *Ibid.*

INTERPRETATION OF STATUTES—*Continued.*

14. *Railroads—Rights of Way—North Carolina—Railroad—Charter—Presumption of Grant—Developments—Interpretation of Statutes—Time.*—According to its charter provisions the North Carolina Railroad Company could acquire a right of way for its railroad by condemnation proceedings, and section 29 was intended to provide for instances where these proceedings had not been instituted and evidence of the consent of the owners had been lost or could not be produced. The charter should be interpreted as of the time the Legislature granted it, and under the conditions then existing, and thus the provision therein that in the absence of a grant from the owner of the land, his right of action is barred if he fails to claim compensation within two years is valid, the statute raising a presumption of a grant of the land on which the road is located, together with a space of 100 feet on each side of the center of the track. *R. R. v. Olive*, 142 N. C., 273, cited and applied. *Earnhardt v. R. R.*, 358.

15. *Railroads—Rights of Way—Nonuser—North Carolina Railroad—Grant—Owner's Inactivity—Presumptions—Interpretation of Statutes.*—When the owner of land over which the North Carolina Railroad has been run has remained inactive for a period of two years after its completion, a presumption of a grant from the owner arises for the land on which the road is located, and for the width of the right of way provided by the charter. *Ibid.*

16. *Same—Owner's Improvements—Damages.—Semble,* that as the presumption of a grant by the owner to the North Carolina Railroad does not arise except in the absence of a contract, when permanent structures erected by the owner within 100 feet of the main line are used for a long time without objection, in localities where it was customary to acquire rights of way by purchase, less in width than 100 feet, the statutory presumption would not arise, when no evidence of a contract was introduced by either party; and damages for permanent improvements on the right of way made in good faith may be recovered when the right of way is subsequently taken for the use of the railroad. *Ibid.*

17. *Same—Rights of Railroad.*—When the North Carolina Railroad Company has acquired lands over which its road extends by reason of the presumption of a grant from the owner under the provisions of the statute, the subsequent use of an unoccupied part of the right of way by the owner, or those claiming under him, cannot affect the right of the company thereto from time to time as the development of its business demanded. *Ibid.*

INTERPRETATION OF STATUTES—*Continued.*

18. *Lessor and Lessee—North Carolina Railroad—Southern Railway—Right of Way—Nonuser—Occupation of Owner—Rights of Lessee.*—The lease by the North Carolina Railroad Company to the Southern Railway Company of its road, franchise, and rights of property, to be operated by the latter, is a valid one; and as the North Carolina Railroad has, under its charter, the right to an unused part of its right of way for laying a double track in the development of its business, the same right extends to the Southern Railway Company under the lease. *Ibid.*

19. *Wills, Holographic—"Valuable Papers and Effects"—Interpretation of Statutes.*—The statute as to a holographic will requires that the paper must have been found "among the valuable papers *and* effects of the deceased" (Revisal, sec. 3127). The substitution, in the Revised Code, of the word "and" for the word "or," was not intended to make any substantial change in the law, and the word "and" should be construed as "or." *In re Jenkins*, 429.

20. *Same—Policies of Insurance.*—The word "effects," as used by Revisal, sec. 3127, includes policies of fire insurance within its meaning. *Ibid.*

21. *Wills, Holographic—Interpretation—Construed Strictly—Expressed Purpose—"Valuable Papers and Effects"—Interpretation of Statutes.*—While the statute relating to holographic wills is mandatory and is to be construed strictly with reference to its requirements, it will not be so rigidly enforced as to defeat its clearly expressed purpose, and it is sufficiently complied with as to the place where the script must be found to constitute a valid will, if it is found among the valuable papers and effects of the deceased, under such circumstances as to show that he regarded it as a valuable paper worthy of preservation and desired it to take effect as his will. *Hughes v. Smith*, 64 N. C., 493, cited and applied. *Ibid.*

22. *Wills, Holographic—"Valuable Papers and Effects"—Comparative Values—Interpretation of Statutes.*—The statutory requirement that the script must be found "among the valuable papers and effects" of the deceased to constitute a valid holographic will, does not mean that the "papers and effects" must be the most valuable, for such would be uncertain of ascertainment and likely to vary with the changing condition of the affairs of the deceased, and to depend upon his condition in life and business habits, and confusing in the event the deceased had more than one place of deposit for them. *Ibid.*

INTERPRETATION OF STATUTES—*Continued.*

23. *Wills, Holographic—Valuable Papers and Effects—Depository—"Found"—Presumptions—Interpretation of Statutes.*—The fact that a holographic will is found among the "valuable papers and effects" of the deceased implies that it was placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will. *Ibid.*

24. *Counties—Agencies of Government—Legislative Discretion—Mandatory Powers—Interpretation of Statutes.*—When a portion of the territory of one county is detached from it and added to another county, the burden of existent indebtedness and the apportionment thereof, in the absence of constitutional provisions, and in so far as the inhabitants are concerned, is referred entirely to the legislative discretion; and when it appears from the act that the commissioners of each county "have full power and authority to properly adjust the share of the bonded and floating debt" outstanding of the county from which the territory is detached, "and to make an equitable levy of taxes thereon to cover the same and to provide for the collection and payment thereof," the power conferred imposes the duty for its exercise. *Commissioners v. Commissioners*, 514.

25. *Executors and Administrators—Final Account and Settlement—Personal Liability—Wagering Contracts—Burden of Proof—Interpretation of Statutes.*—A petition by an administrator for a final account and settlement was resisted by the heirs at law and distributees, and the matter referred. In their answer, the defendants alleged that certain notes, valid on their face, were given for a gambling contract in cotton futures, and should not have been paid: *Held*, the provisions of Revisal, sec. 1691, do not apply so as to place the burden of proof on the administrator to show that the notes were given for a valid contract requiring the actual delivery of cotton; and an exception by the defendant to the report of the referee in holding the payment of the notes a valid disbursement will not be sustained in the absence of any findings as to the nature of the contract for which they were given. *Overman v. Lanier*, 544.

26. *Carriers of Goods—Failure to Furnish Cars—Interpretation of Statutes.*—No substantial error is found on appeal in this case for damages against the carrier for failing and refusing to furnish cars ordered by the plaintiff for the purpose of moving cordwood from a certain siding. *Wright v. R. R.*, 562.

INTERPRETATION OF STATUTES—*Continued.*

27. *Cities and Towns—Condemnation—Special Acts—Requisites—General Laws—Interpretation of Statutes.*—An incorporated town was authorized to erect, own, and operate an electric plant under chapter 217, Private Laws of 1911, conferring the power of condemnation "in the same manner as is now provided by law for the condemnation of lands for streets." The charter of the town contains no method of procedure for condemning lands for streets: *Held*, that to lawfully authorize a municipal corporation to exercise the right of eminent domain the power must be expressly conferred or arise by necessary implication and the procedure necessary to give it effect must be provided; but a valid exercise of this power may be done by the municipality under the general law, ch. 86, sec. 1, Public Laws of 1911, where all requisite powers are conferred. *Eppley v. Bryson City*, 487.

28. *Rape—Assault with Intent—Assault on Woman—Interpretation of Statutes—Proviso—Age — Indictment—Allegations—Defense.*—By statute, Revisal, 3620, as amended by the Laws of 1911, ch. 193, the punishment for "assaults, assaults and batteries, etc.," is limited to a fine not exceeding $50 or imprisonment for thirty days in certain instances: *Provided*, among other things, that it shall not apply to an assault by a man, or by a boy over eighteen years of age, upon a woman: *Held*, it is for the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over that age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. *S. v. Smith*, 578.

29. *Rape, Assault on Woman—Intent—Allegations—Age—Indictment—Defense—Interpretation of Statutes.*—When an indictment charges an assault with the intent to commit rape, the prisoner may be convicted of an assault upon a woman (Revisal, sec. 3268); and if it is found that he was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not. Revisal, secs. 3268, 3620. *Ibid.*

30. *Legislative Acts—Ex Post Facto Laws—Interpretation of Statutes.*—Repeals by implication are not favored by the law, and an act which merely leaves it in the discretion of the trial

INTERPRETATION OF STATUTES—*Continued.*

judge to impose a longer sentence for an offense than that prescribed by a former act, without changing the constituent elements of the crime, does not repeal the former act; and a subsequent sentence for the crime committed prior to the time of the enforcement of the second act, which does not exceed the limited time of punishment prescribed by the prior act, is valid. *S. v. Broadway*, 598.

31. *Same—Register of Deeds—Clerk to Board County Commissioners—Interchangeable Positions—Interpretation of Statutes.*—The register of deeds is *ex officio* clerk to the board of county commissioners (Revisal, 2666), and the two positions are not separate offices, but used interchangeably in the statute (Revisal, 5238, 5239, 5240), and it is provided (Revisal, 5237) that the tax book to be made out by the register of deeds "shall remain in the office of" the clerk of the board of commissioners, and *Held*, a charge of an unlawful, etc., obliteration of the tax books required to be kept by the register of deeds meets with the requirements in that regard of Revisal, 3508. *S. v. Gouge*, 602.

32. *Register of Deeds—Tax Books—Township Totals—Mutilation—Indictment—Interpretation of Statutes.*—While the statute does not require the total tax for each township to be put in the tax book or record of the computation of taxes for a county, it is a customary and convenient practice, and when such has been done, a mutilation or change of the totals on the record falls within the meaning of Revisal, 3508, and is an indictable offense when its provisions have been violated; besides, objections, in this respect, relate to matters of proof and not to the sufficiency of the indictment. *Ibid.*

33. *Indictment—Housebreaking—"Felonious"—Motion in Arrest of Judgment.*—An indictment under Revisal, sec. 3333, for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal," etc., and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony"; and a motion in arrest of judgment on that ground should be denied. *S. v. Goffney*, 624.

34. *Housebreaking—Act Procured—Lawful Entry—Felonious Intent.*—In order to convict of housebreaking under Revisal, sec. 3333, there must have been an unlawful entry by the

INTERPRETATION OF STATUTES—*Continued.*

prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. *Ibid.*

35. *Insurance—Interpretation of Statutes.*—Our statute-law makes elaborate and minute provisions for the protection of its people from imposition under the guise of insurance, real or pretended, and our insurance department is created and charged with the special duty of seeing that these provisions are complied with. *S. v. Arlington*, 640.

36. *Insurance—Foreign Corporations—Local Branches—Sick and Death Benefits—License to Agents—Insurance Commissioner—Interpretation of Statutes.*—A corporation organized with a home office in another State, with executory supervision and control of branch organizations, in some respects local in their character, with provision in the by-laws that the local branch may pay sick and death benefits to their members, the local organization paying certain fees to the home office for new and old members, comes within the intent and meaning of our insurance laws, requiring that all insurance companies must be licensed and supervised by the Insurance Commissioner (Revisal, sec. 4691); that every agent must pay a license tax, etc. (Revisal, sec. 4706); that a general or district agent or organizer or local or canvassing agent must pay a certain tax as to each, section 4715 (3). *Ibid.*

37. *Insurance Companies—Foreign Corporations—Fraternal Orders—Interpretation of Statutes.*—Fraternal insurance orders are such as make provision for sick and death benefits (Revisal, 4794, *et seq.*), and they are subject to the same rules, regulations, and supervision as foreign insurance companies, when operated from beyond the State, except that they are not required to make the deposit or have the paid-up-capital required of other companies. *Ibid.*

38. *Insurance — Foreign Corporations—Fraternal Orders—Definition—Interpretation of Statutes.*—One who without license from the Insurance Commissioner, advertises and represents that a certain order operating from another State "was there"; that he was the representative; that the order paid accident and death benefits; that he solicited people to "come at once and join"; that he gave a membership receipt to those who applied and paid the membership price, is an

INTERPRETATION OF STATUTES—*Continued.*

insurance agent within the purview of the statute, and indictable thereunder for soliciting insurance in a company not complying with our laws and for not having been licensed by the Insurance Commissioner to solicit business. *Ibid.*

39. *Insurance — Agents Licensed — Indictment—Interpretation of Statutes.*—The language of our statute relative to making it unlawful for one to solicit business for a foreign insurance company is, "If any person shall assume to act as an insurance agent without a license therefor, as required by law," and a bill of indictment for the offense will not be held fatally defective because it contains no direct averment that a fraternal order for which the business has been solicited is a company subject to the insurance regulations, when otherwise it is sufficient. *Ibid.*

40. *Insurance — Unincorporated Companies — Interpretation of Statutes.*—Our statutes relating to the regulation and supervision of insurance companies by the Insurance Commissioner uses the words insurance companies, associations, and orders, and clearly contemplates both incorporated and unincorporated companies. *Ibid.*

41. *Usury — Interpretation of Statutes — Usury Charged or Reserved.*—It was proven that the defendant, indicted under Revisal, sec. 3712 (a), made a loan of $10, taking a note for $16.75, secured by a mortgage on household and kitchen furniture, worth at least $25: *Held*, under the language of our statute, the charge of the usurious interest constituted the offense without the necessity of having received it; and under the facts of this case an usurious rate of interest for the period of the loan, to wit, $1.75, was actually reserved. *Ibid.*

INTERSTATE COMMERCE. See Carriers of Goods, 10.

1. *Railroads—Interstate Commerce—Master and Servant—Intrastate Cars—Federal Employer's Liability Act.*—A locomotive engineer on a train which carries interstate cars is engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, though there are intrastate cars in the train. *Horton v. R. R.*, 146.

2. *Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.*—When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions. *Ibid.*

INTERSTATE COMMERCE—*Continued.*

3. *Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.*—When a plaintiff has sued in the State court and has pleaded and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act. *Ibid.*

INVITATION IMPLIED. See Trespass, 11.

IRREGULAR JUDGMENTS. See Motions, 10.

ISSUES. See Instructions, 2, 3; Pleadings, 19.

1. *Tenants in Common—Contract to Convey—Issues.*—In proceedings for partition of lands by tenants in common, a contention by one of them that the others had contracted to convey their interests therein to him, which is denied, directly involves the existence of the contract on an issue as to the fact of the tenancy in common. *Coltrane v. Laughlin*, 282.

2. *Issues—Pleadings—Appeal and Error.*—When the issues submitted arise from the pleadings and present all the contentions of the parties it will not be held as reversible error on appeal for the court to refuse to submit other issues. *Arthur v. Henry*, 393.

3. *Issues—Negligence—Several Acts—Instructions.*—When in an action for damages alleged by reason of defendants' negligence in inflicting a personal injury on the plaintiff, several acts of negligence are relied on and there is evidence to support them, it is proper for the trial judge to submit separate charges as to each, presenting the contentions of the plaintiff, upon which the issue of negligence may be answered in the affirmative, and to tell the jury that if they do not find the facts as contended, that the defendant would not be negligent in that respect. *Patterson v. Nichols*, 406.

4. *Reference—Trial by Jury—Exceptions—Issues Tendered—Procedure.*—A party to a compulsory reference should not only have proper exceptions entered, but tender the issues arising from the evidence and attach them to his exceptions to the referee's report when he desires to preserve his right to a trial by jury thereon. *Church v. Dawson*, 566.

5. *Assault — Indictment — Conviction of Less Offense—Issues—Punishment.*—Under a bill of indictment charging an assault with an intent to commit rape, the lesser offense of assault

ISSUES—*Continued.*

and battery may be found to have been committed, and in such instance a special issue may be submitted to the jury, if necessary, so that, in accordance with the jury's finding, the court may determine the grade of the punishment. *S. v. Smith*, 578.

6. *Homicide—Murder in First Degree—Answer to Issues.*—Our statute on the subject peremptorily requires that before sentence of death may be pronounced, the trial jury shall determine in their verdict that the prisoner is guilty of murder in the first degree (Revisal, sec. 3271), and our trial courts should always require that verdicts in capital cases definitely and expressly state the degree of murder of which the prisoner is convicted, and the verdict should be recorded as rendered. *S. v. Murphy*, 614.

JUDGMENT BY DEFAULT. See Pleadings, 5, 6.

JUDGMENTS. See Motions, 8, 9, 19; Insurance.

1. *Railroads — Relief Department — Benefits Received—Personal Injuries — Negligence — Judgment — Credits.*—When an employee of a railroad company has accepted benefits from its relief department under conditions permitting recovery for personal injuries negligently inflicted on him, the amount of the benefits received should be credited on the judgment. *King v. R. R.*, 44.

2. *Judgments—Irregularities—Attachment—Sale—Innocent Purchaser for Value—Procedure.*—When judgment by default final and attachment on his lands has been set aside against a nonresident defendant for irregularity, and the property seized under the attachment has been sold and deed made to a purchaser who is not a party to the motion, the action of the court in setting aside the judgment will not prejudice his rights; but he should be made a party; and if it is found that he is an innocent purchaser for value, *semble*, that the judgment may be set aside as between the parties and retained for his protection. *Currie v. Mining Co.*, 209.

3. *Same.*—In this case the fact that the defendant, the president and the corporation, both nonresidents, upon whom judgment by default for want of an answer had been obtained upon service of summons by publication, knew of the pendency of the action before judgment was rendered, and that neither moved in the matter for more than twelve months thereafter, would have an important bearing upon the rights of a party to whom a deed to the attached lands in controversy had been made, and who claimed as an innocent purchaser for value. *Ibid.*

JUDGMENTS—*Continued.*

4. *Nonresidents — Judgment Set Aside — Request to Plead—Appearance.*—A request of nonresident defendants to answer the complaint, in their application to have a judgment set aside for irregularities, is equivalent to a general appearance. *Ibid.*

5. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing. *Coltrane v. Laughlin*, 282.

6. *Verdict — Judgment—Extent of Error Ascertained—Supreme Court—Procedure.*—Where under an erroneous instruction the jury has awarded double the amount of the damages actually sustained by the plaintiff in an action of trespass and unlawful cutting of timber trees in the counties specified in the Laws of 1907, ch. 320, and it can readily be ascertained from the verdict what sum is properly recoverable, the correction will be made in the Supreme Court without granting a new trial. *Lumber Co. v. Hayes*, 333.

7. *Executors and Administrators — Partial Recovery — Costs — Statement—Reformation—Interest.*—In this action, in the nature of one to personally charge the administrator with certain debts of the estate, there was final recovery of about $6,000 in excess of the sum the administrator admitted to be due; and all costs should be taxed against him but for the fact that the heirs and distributees unsuccessfully sought to recover further and larger sums; it is adjudged that the cost of the litigation be divided between the parties and that the account of the administrator be reformed, and that interest be charged on the correct amount due by him from the date of his filing his report. *Overman v. Lanier*, 544.

8. *Judgment—Motion in Arrest—Conviction—Indictment.*—A motion in arrest of judgment will not be allowed after conviction, for the reason that a bill of indictment charging the unlawful manufacture and sale of spirituous, etc., liquors did not state the date of the commission of the alleged offense or the county in which it had been committed. *S. v. Francis*, 612.

9. *Same—Defects in Bill.*—To sustain a motion in arrest of judgment after verdict for defects in the indictment, it must ap-

JUDGMENTS—*Continued.*

pear that the bill is so defective that a judgment cannot be pronounced upon a verdict thereunder. *Ibid.*

10. *Same—Captions of Bill.*—An omission in the caption of a bill of indictment cannot be a ground for arresting a judgment under the indictment, for the caption is not a part of the bill in this sense. *Ibid.*

11. *Judgment—Motion in Arrest—Conviction—Indictment—Allegations—Term of Court—Procedure.*—Omitting to state the term of the court in which a true bill is found is not a sufficient ground upon which to sustain a motion in arrest of judgment; especially so when from the record it appears at what term the bill was returned. *Ibid.*

12. *Judgments—Motion in Arrest—Indictment—Allegations—Time of Offense.*—Time is not of the essence of the offense charged in a bill of indictment, and the failure of the bill to allege it is not a defect upon which the judgment will be arrested after verdict. *Ibid.*

13. *Judgment—Motion in Arrest—Statutory Period—Instructions—Burden of Proof.*—When for conviction it is necessary to show the offense was committed within two years, the burden is upon the State to show it, which may be taken advantage of by the prisoner by a special request for instructions, and not by a motion in arrest of judgment after verdict. *Ibid.*

JUDICIAL NOTICE. See Railroads, 1.

JUDICIAL SALES. See Constitutional Law, 22.

JUDICIARY. See Constitutional Law, 22.

JURISDICTION. See Courts, 1, 2, 6, 7, 11, 17, 18.

JUS ACCRESENDI. See Husband and Wife, 2.

JUSTICE OF THE PEACE. See Courts, 2, 3, 4, 19.

LABORERS. See Liens, 3.

LACHES. See Appeal and Error, 17.

LANDLORD AND TENANT. See Statute of Frauds, 7, 8, 9.

LAST CLEAR CHANCE. See Railroads, 30.

LAWFUL ENTRY. See Indictment, 20.

LEGISLATIVE AUTHORITY. See Bond Issues, 1, 2, 3; Statutes.

LEGISLATIVE DISCRETION. See Statutes, 6, 7, 8.

LEGISLATURE. See Statutes; Constitutional Law, 20, 22.

LESSOR AND LESSEE.

Lessor and Lessee—North Carolina Railroad—Southern Railway—Right of Way—Nonuser—Occupation of Owner—Rights of Lessee.—The lease by the North Carolina Railroad Company to the Southern Railway Company of its road, franchise, and rights of property, to be operated by the latter, is a valid one; and as the North Carolina Railroad has, under its charter, the right to an unused part of its right of way for laying a double track in the development of its business, the same right extends to the Southern Railway Company under the lease. *Earnhardt v. R. R.*, 358.

LETTERS. See Evidence, 111.

LEX LOCI CONTRACTUS. See Carriers of Goods, 11.

LICENSE. See Insurance, 17.

LIENS.

1. *Liens—Material Men—Identity of Property—Interpretation of Statutes.*—A line of poles, wires, and appliances carrying electricity from a dynamo to a manufacturing plant for power and lighting purposes retains its identity and therefore is not "material furnished" within the meaning of Revisal, 2016, so as to entitle the vendor to a lien upon the plant, for in such instances the vendor could retain title under a conditional sale or by a mortgage lien which would protect his debt. *Pipe Co. v. Howland*, 111 N. C., 615, cited and distinguished. *Fulp v. Power Co.*, 154.

2. *Equity — Creditor's Bill—Liens—Amount of Claim—Superior Court's Jurisdiction—Justice's Courts.*—The Superior Court having taken charge of the debtor's property in a creditor's bill under its general jurisdiction, may collect and dispose of all the assets and determine the liens and priorities and make application accordingly of the funds, irrespective of the amount of any claim, including liens for labor and material less than $200, of which otherwise the court of a justice of the peace would have jurisdiction. *Fulp v. Power Co.*, 157.

3. *Liens—Material and Labor—Clerk—Notice—Record Sufficient.* The purpose of filing mechanic's, etc., claims for liens, Revisal, sec. 2026, is to give public notice of the claims, the amount, the material supplied or the labor done and when done, on what property, specified with such detail as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. *Ibid.*

LIENS—*Continued.*

4. *Same—Schedule Referred to.*—When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, asking that it "be taken as a part of the notice of lien," it is a sufficient compliance with the statute. Revisal, secs. 915 (21), 2026. *Ibid.*

5. *Liens—Conditional Sale—Reservation of Title—Realty—Registration.*—Goods sold under a contract reserving title in the vendor, which are attached to the realty, become realty except as between the parties, but not as against others who have acquired a lien for labor and material before the registration of the conditional sale. *Ibid.*

LIGHTS. See Negligence, 16, 22.

LIMITATIONS OF ACTIONS.

1. *Wills—Devises—Defeasible Fee—Life Estate—Limitations of Actions.*—A devise of lands terminable upon the death of the devisee "without lawful issue" is a life estate upon the happening of the contingent defeasible event, and the statute of limitations does not begin to run against the remainderman in fee until the life estate falls in. *Maynard v. Sears*, 1.

2. *Cities and Towns—Streets—Evidence—Nonsuit — Statute of Limitations—Harmless Error.*—In this case damages are recoverable by plaintiff for diminution in the value of his property abutting on the street caused by the city's negligent construction in making authorized changes, and the error committed in the lower court in sustaining a nonsuit upon the evidence is adjudged harmless by reason of the statute of limitations having run against plaintiff's cause of action. *Earnhardt v. Commissioners*, 234.

3. *Same—Statute of Limitations — Pleadings — Evidence.*—The statute of limitation of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred. *Ibid.*

4. *Nonsuit—New Action—Twelve Months—Limitation of Actions.* The provision of Revisal, sec. 370, that after nonsuit the

LIMITATIONS OF ACTIONS—*Continued.*

plaintiff may commence a new action on the same subject-matter within twelve months was not intended to abridge the time within which actions of that character may be brought, but to extend it. *Lumber Co. v. Hayes*, 333.

5. *Same—Trespass—Timber Trees.*—In an action for damages for trespass and cutting timber trees, the action may be again commenced more than twelve months after judgment of nonsuit if not otherwise barred by the statute of limitations applicable. *Meekins v. R. R.*, 131 N. C., 1; *Trull v. R. R.*, 151 N. C., 547, cited and distinguished. *Ibid.*

6. *Measure of Damages—Retraxit — Consideration — Evidence—Limitation of Actions.*—When, with competent evidence, the plaintiff has established his right to recover damages to his property caused by the negligent blasting of rock by the defendant, his statement on the witness stand that he asks no damages prior to a certain date within the statutory time, is not a *retraxit* and is without consideration, and does not bar him of his right to recover all the damages he is entitled to not barred by the statute of limitation pleaded by the defendant. *Arthur v. Henry*, 393.

7. *Limitations of Actions—Absence from State—Computation of Time—Interpretation of Statutes.*—The absence of a defendant from the State for more than one year is excluded from the computation of time for the running of the three-year statute pleaded in bar. Revisal, sec. 366. *Ibid.*

8. *Adverse Possession—Title—Evidence.*—The defendant having shown, in deraigning his title, a grant from the State to him of the *locus in quo*, the plaintiff introduced evidence tending to show that the land was unfit for cultivation and that for more than twenty years next before the commencement of the action his tenants had continuously used it for "timber, wood, pine," and that they "would cut wood there nearly every day," that being the only purpose for which it was available; that the plaintiff had cut roads through the lands which his tenants had used, as well as other roads theretofore cut; that plaintiff was using it for its timber and for the purpose of subsequently getting a water supply therefrom: *Held*, evidence of adverse possession sufficient to ripen defendant's title, for the determination of the jury. *Berry v. McPherson*, 153 N. C., 4, cited and applied. *Coxe v. Carpenter*, 557.

LIS PENDENS. See Pleadings, 14, 15.

LIVE STOCK. See Carriers of Goods, 5, 6, 7, 8, 9, 10, 11.

LOCAL CUSTOM. See Evidence, 49, 50.

LOGGING ROAD. See Railroads.

MANDAMUS.

Sheriffs—Taxes—Mandamus—Procedure.—A graded school and county commissioners sued the sheriff for taxes collected which should have been paid the school, and the defendant set up a counterclaim that for certain previous years the county commissioners had wrongfully appointed another to collect these taxes, and that the commissions thus due him should be deducted from plaintiff's claim: *Held*, (1) the sheriff's remedy was by mandamus against the county commissioners at the time alleged, to have the tax books placed in his hands by the county commissioners, and an injunction to prevent the payment of the commissions to the collector alleged wrongfully to have been appointed, until his right had been decided; (2) or by suit against the collector alleged to have been wrongfully appointed, for the commissions paid to him. *Graded School v. McDowell*, 316.

MANSLAUGHTER. See Homicide, 4.

MAPS. See Evidence.

MARRIAGE. See Divorce, 4, 5, 6, 7.

MARRIED WOMEN. See Deeds and Conveyances.

MASTER AND SERVANT.

1. *Master and Servant—Negligence—Safe Place to Work—Duty of Master—Negligence—Evidence.*—When in an action for damages for a personal injury received by an employee while at work in a machine shop, there is evidence tending to show that a brass chip from a boring mill struck him in the eye and caused the injury complained of, which would not have occurred if a screen, known and in general use, had been furnished and properly placed, evidence is competent to show from the condition of an air hammer with which the plaintiff was at work at the time, and from the fact that plaintiff was not then striking with it, that the injury could not have been caused by a chip flying on account of his own negligent use of the hammer, the defendant contending that the injury was caused by a chip from the air hammer. *Pritchett v. R. R.*, 88.

2. *Same—Immediate Injury—Contributory Negligence.*—Upon conflicting evidence as to whether the plaintiff, an employee, was negligently injured in defendant's machine shop, by a brass chip flying from a boring mill being operated near

MASTER AND SERVANT—*Continued.*

where he was working, without protecting him with a shield customarily used for the purpose, it is competent for the plaintiff to show, upon the question of his contributory negligence, that the boring mill was not in operation when he commenced to work, that the chip entered his eye almost instantly, and that he would have completed his work there within one and one and a half minutes, as relevant upon the question as to whether he should have taken greater precautions for his safety if he had been required to stay there longer in the position he necessarily assumed. *Ibid.*

3. *Master and Servant—Contributory Negligence—Declarations of Master — Haste — Unaccustomed Work—Evidence.*—The plaintiff was an employee of the defendant in its machine shop, and there was evidence tending to show that he was injured in the eye by a flying brass chip from a boring mill operated near, without the customary guard for his protection, just after he had been ordered there by defendant's foreman: *Held*, evidence is competent, on the question of contributory negligence, tending to show that the defendant's foreman told the plaintiff shortly prior to the injury that they were behind on that particular piece of work and he wanted him to assist on the job in place of the regular man, who was sick. *Ibid.*

4. *Master and Servant — Safe Place to Work — Flying Chips — Screen—Negligence—Evidence.*—The plaintiff was injured in the eye while working in defendant's machine shop, and there was evidence tending to show that it was received by a flying brass chip from a boring mill, operated near the place where he was at work, which would not have occurred had the borer been guarded by a shield customary and in general use: *Held*, evidence is competent that this machine had theretofore thrown chips in the place where plaintiff was working when injured, under similar conditions, for the purpose of fixing the defendant with notice of the danger. *Ibid.*

5. *Master and Servant—Safe Place to Work—Negligence—Former Conditions—Notice Implied—Ordinary Care—Evidence.*—The burden of proof is on the plaintiff to show that the place furnished him by the employer to work in was unsafe, when for that reason he seeks to recover damages for an injury therein inflicted. and that the defendant knew it to be so, or that it could have discovered it by the exercise of ordinary care; and evidence that the condition complained of had previously existed for a long period of time is evidence of defendant's knowledge. *Ibid.*

MASTER AND SERVANT—*Continued.*

6. *Master and Servant—Safe Place to Work—Negligence—Causal Connection—Burden of Proof.*—An employee must show, in his action for damages for personal injury alleged to have been negligently caused by the master's not furnishing him a safe place to work, that the negligence complained of was the real and proximate cause of the injury, and not merely that he was working at an unsafe place on the premises at the time. *Ibid.*

7. *Master and Servant—Dangerous Machinery—Higher Degree of Care—Duty of Master.*—The employer is held to a higher degree of care in providing for the safety of an employee whose services are rendered as a mechanic in a shop containing intricate and dangerous machines, than formerly when the tools were simpler and the mechanic more familiar with their qualities and the dangers incident to their use. *Ibid.*

8. *Master and Servant—Safe Place to Work—Machine Shop—Flying Chips of Metal—Guard—Negligence—Evidence.*—In an action to recover damages for a personal injury to the plaintiff's eye, there was evidence that the injury occurred on the day of his employment in a machine shop with complicated machinery in motion; that the place of his employment was new to him, and that the injury was caused by a brass chip flying from a boring mill located near, which started in operation after he had begun a piece of work requiring him to face the boring mill in its performance, and which was without a guard in general use, which would have arrested the chip and avoided the injury, if properly placed; that owing to the character of the wound, the injury was caused by a chip from the boring mill, which was throwing the chips around the place where plaintiff was necessarily at work, and not from the machine plaintiff was operating at the time: *Held*, sufficient evidence of defendant's negligence as the proximate cause of the injury, on a motion to nonsuit. *Ibid.*

9. *Master and Servant—Duty of Master—Delegated Duty—Contributory Negligence—Assumption of Risks.*—In an action for damages brought against the employer for failure to provide for the plaintiff, an employee, a safe place to work, it is proper for the jury to consider the knowledge or familiarity of the employee with the conditions and surrounding circumstances of his work, on the issue of contributory negligence; and as it is an absolute duty the employer owes to provide for his employee a safe place to

MASTER AND SERVANT—*Continued.*

work, which he cannot delegate, and as the employee accepts only such risks as are ordinary to the employment, the doctrine of assumption of risks has no application. *Ibid.*

10. *Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Negligence.*—An employer of labor must furnish the employee a place to do the work assigned to him as reasonably safe as the nature of the business will admit, and when the employment is in the operation of mills and other plants having machinery more or less complicated and driven by mechanical power, he is required to provide methods, implements, and appliances such as are known, approved, and in general use. *Walker v. Manufacturing Co.*, 131.

11. *Same—Evidence—Nonsuit.*—In an action to recover damages for the alleged negligent killing of plaintiff's intestate, employed by defendant to operate a rip-saw in his plant operated by steam, there was evidence tending to show that the saw was "wobbly" and operated with antiquated machinery upon a table that was of an obsolete kind, and by belts nearly horizontally placed, without boxing or guards, so that planks could readily fall upon them under the circumstances of the employment, and cause the injury complained of, by being hurled from the running belt, and in no other manner; that the machinery and appliances furnished were not such as were known, approved, and in general use, and if they had been the injury would not have been inflicted: *Held*, the evidence was sufficient for the jury to find that the plank had been hurled upon the plaintiff's intestate from the unguarded belt, owing to the defendant's negligence, and a motion to nonsuit was properly overruled. *Ibid.*

12. *Same—Contributory Negligence—Burden of Proof.*—In an action for damages for the alleged negligent killing of plaintiff's intestate while at work at defendant's rip-saw, by reason of improper machinery and appliances furnished by the defendant for the work, causing the death by a plank hurled from a running belt, the defense of contributory negligence was set up in bar, that the intestate was sawing, at the time of the injury, a board on the table, and before the board had gone through the saw he put another board in and negligently and carelessly sawed the second board and shoved it so that the first board caught in the saw and was thrown back, striking him on the head and causing his death, and against this the intestate had been warned: *Held*, an instruction to the jury was correct which, in effect,

MASTER AND SERVANT—*Continued.*

charged if they should find from the greater weight of the evidence that the intestate was injured in this manner, the plaintiff could not recover. *Ibid.*

13. *Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Assumption of Risks.*—In an action for damages for the wrongful killing of plaintiff's intestate while at work at defendant's rip-saw, there was evidence tending to show that it was done by a plank falling upon and being thrown from an unguarded belt operating the saw, and that the machinery was old and obsolete: *Held*, a charge was correct, upon the application of the doctrine of assumption of risks, that if the jury find from the greater weight of the evidence that the conditions were such that only a reckless man would have continued to work thereunder, and the probabilities of being injured were greater than the probabilities of safety, the jury should answer the pertinent issue in the affirmative, in defendant's favor, for upon the facts in this case it could not be assumed as a matter of law. *Ibid.*

14. *Railroads—Interstate Commerce—Master and Servant—Intrastate Cars—Federal Employer's Liability Act.*—A locomotive engineer on a train which carries interstate cars is engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, though there are intrastate cars in the train. *Horton v. R. R.*, 145.

15. *Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.*—When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions. *Ibid.*

16. *Railroads—Master and Servant—Defective Appliances—Negligence—Evidence.*—When there is evidence tending to show that the eye of the engineer of the defendant railroad company was injured by an explosion of the water-glass in the cab of his locomotive, while in the discharge of his duties, and that the injury could not have happened had the defendant, after notice, supplied the water-glass with the usual shield or guard in general use by railroad companies, it is sufficient upon the question of defendant's negligence. *Ibid.*

17. *Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.*—When a plaintiff has sued in the State court and has pleaded

MASTER AND SERVANT—*Continued.*

and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act. *Ibid.*

18. *Master and Servant—Driver of Teams—Negligence—Scope of Employment—Respondeat Superior.*—The master is not responsible for the negligent acts of the servant employed for the ordinary duty of driving a team of mules hitched to a wagon for the purpose of hauling lumber, in causing an injury to one whom, in the absence of the master and without his knowledge, express or implied, he had permitted to ride on the wagon loaded with lumber; for such acts are beyond the scope of the servant's employment, and not done in furtherance of the duties owed by the servant to the master. *Dover v. Manufacturing Co.*, 324.

19. *Same—Implied Authority.*—One who is employed to drive a team of mules to a wagon for the ordinary purposes of hauling has no implied authority from the master to permit boys to ride on the wagon, as such is not within the scope of the servant's employment. *Ibid.*

20. *Same—Dangerous Instrumentalities.*—The plaintiff's intestate having been killed from an injury received while riding on a wagon loaded with lumber drawn by a team of mules with a tendency to run away, in charge of the defendant's driver, with the permission of the driver and without the knowledge of the defendant, plaintiff brings his action on the grounds that the injury was inflicted through the negligence of the driver: *Held*, a team of mules and wagon is not a "dangerous instrumentality" within the meaning of *Stewart v. Lumber Co.*, 146 N. C., 85, making the master liable for the injury inflicted, without regard to whether the servant was acting beyond the scope of his employment. *Ibid.*

21. *Contracts — Independent Contractor — Negligence — Collateral Employment—Respondeat Superior.*—The owner or proprietor of work to be done by an independent contractor cannot escape liability upon the ground that an injury was inflicted by the act of an independent contractor, when the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not acting *bona fide* under the terms of the contract, but was, in fact, only the agent of the owner or proprietor in the work that plaintiff was engaged in doing. *Young v. Lumber Co.*, 147 N. C., 26, cited and applied. *Johnson v. R. R.*, 382.

MASTER AND SERVANT—*Continued.*

22. *Contracts—Independent Contractor — Dangerous Work—Owner's Liability—Respondeat Superior.*—The owner or proprietor of work necessarily and inherently dangerous in its performance, as in this case blasting rock in the corporate limits of a town near the homes of the plaintiff and several others, and which to the knowledge of the defendant had caused rocks to be thrown upon plaintiff's dwelling and rocks and dirt upon his premises, with loud explosions and great force, cannot, by contract with another creating the relationship of independent contractor, escape liability from the damaging consequences of the work done thereunder. *Hunter v. R. R.*, 152 N. C., 688, cited and applied. *Arthur v. Henry*, 393.

23. *Master and Tenant—Evidence—Nonsuit.*—Where in the defense to an action for damages for a personal injury the relationship of independent contractor is unsuccessfully relied on by the owner or proprietor, the evidence tending to show that the damages sought were caused by the negligent act of the independent contractor will be considered on motion to nonsuit in the same view as that of the owner and proprietor, and when there is conflicting evidence as to the negligent act, the court may not pass upon the credibility of witnesses, but must leave the question for the determination of the jury. *Ibid.*

24. *Same.*—The evidence in this case is sufficient of an agent's negligence for which his principal is responsible in damages caused by blasting near the residence of the plaintiff in an incorporated town, which tends to show that for smothering the blasts six small pine logs were used, that stones were showered on plaintiff's premises, falling around the house in which he and his sister lived, one of the stones "as large as an ordinary letter box" falling beyond the house, and shattering a limb of a tree in front of it, others falling on sheds on the premises and likewise destroying plaintiff's grapevines and fruit trees. *Ibid.*

25. *Master and Servant—Dangerous Work—Wantonness and Recklessness—Punitive Damages — Respondeat Superior.*—When there is evidence that the defendant negligently caused damages to the plaintiff's property from blasting near it, punitive damages are recoverable when it is shown that the defendant evinced a reckless indifference to the rights of the plaintiff, and that the acts complained of were wantonly done, or from a bad motive. *Ibid.*

26. *Same—Notice.*—When there is evidence of recklessness and wantonness on the part of defendant's lessee which caused

MASTER AND SERVANT—*Continued.*

damage to plaintiff's property located near, a conversation between the parties to the effect that a rock had fallen from a blast on the plaintiff's house previously, is competent as tending to fix the defendant with notice of the danger to plaintiff's property at the time of his making the lease set up in defense to avoid liability, there being evidence that the lease was made in order that the defendant might continue to have the blasting done and thus make the defense available to him. *Ibid.*

27. *Employer and Employees—Safe Place to Work—Negligence—Evidence.*—In an action for damages for personal injury received by the employee, evidence that the cause of the injury was due to the failure of the employer to furnish him a reasonably safe place in which to do the work assigned to him, or proper appliances for the purpose, is evidence of actionable negligence. *Patterson v. Nichols*, 406.

28. *Same—Machinery.*—In an action by the employee for damages for a personal injury received from the alleged negligent failure of the employer to provide him a safe place in which to work, there was evidence tending to show that the employee had fixed a certain piece of shafting suspended about 10 feet from the floor, which required the stopping of a part of the machinery, by throwing off the belt; that there was no "shifter" for this purpose, and to start this part of the machinery in motion again the servant had to mount a ladder placed against the wall in a space of 2 feet between the shaft and the wall, with his back to a projecting set-screw, which should have been counter-sunk, and reach over the pulley to put the belt back on while the other machinery was in motion; that while so doing, with his back necessarily towards the revolving shafting and projecting set-screw, the latter caught him in the collar of his overalls and threw him, to his injury: *Held*, evidence sufficient to take the case to the jury. *Ibid.*

29. *Master and Servant—Safe Place to Work—Contributory Negligence—Evidence.*—When there is sufficient evidence tending to show the employer's negligence in not providing his employee a safe place in which to fix certain shafting run by steam power, causing him to be injured, while placing a belt upon a machine at the top of a step-ladder provided for the purpose, the jury, before answering the issue as to contributory negligence in the affirmative, must be satisfied by the greater weight of the evidence that the plaintiff knew of the danger which he was incurring or in the exercise of reasonable care should have known it; and that the work was so

MASTER AND SERVANT—*Continued.*

obviously dangerous that a man of reasonable prudence would not have engaged in it; or that in its performance he did not exercise reasonable care for his own safety. *Ibid.*

30. *Safe Appliances—Approved and in General Use—Causa Causans—Evidence.*—The plaintiff, while engaged in placing a belt upon a pulley to run certain machines in a laundry, was injured by the collar of his overalls catching on a projecting set-screw on a revolving shaft, 10 feet from the floor, while he was standing upon a step-ladder, and there was evidence tending to show that the master had failed to provide a "shifter" which was approved and in general use for the purpose of shifting belts: *Held,* in the absence of evidence tending to show that it was practical to use the "shifter" under the circumstances of this case, and the evidence tending to show that the work being done was unusual in the employee's employment, an instruction was erroneous which involved the application of the principle that the employer should furnish appliances approved and in general use. *Ibid.*

31. *Master and Servant—Servant's Torts—Scope of Employment—Respondeat Superior.*—The master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders or doing the work, but wholly for the servant's own purposes and in the pursuit of his private or personal ends. *Bucken v. R. R.*, 440.

32. *Same—False Imprisonment—Assault and Battery—Evidence—Questions for Jury.*—In this action to recover damages for false imprisonment, and assault and battery, alleged to have been received at the hands of defendant's agents, there is sufficient evidence that the acts complained of were done in the furtherance of the master's work for the application of the doctrine of *respondeat superior.* *Ibid.*

33. *Master and Servant—Dangerous Instrumentalities—Safe Place to Work—Appliances — Evidence — Nonsuit.*—Upon evidence tending to show that the plaintiff, an uninstructed and inexperienced man, was injured while blasting with dynamite in the employment of the defendant, using an iron tamping rod furnished him and the other employees, which resulted in the explosion causing the injury, a motion to nonsuit should be denied. *Brazille v. Barytes Co.*, 454.

34. *Master and Servant—Dangerous Instrumentalities—Instructing Servant—Negligence—Evidence—Instructions.*—Upon the evidence in this case tending to show that plaintiff, an inex-

MASTER AND SERVANT—*Continued.*

perienced man, was employed without instruction to blast with dynamite, using an iron tamping rod furnished him for the purpose, which caused the explosion inflicting the injury complained of: *Held,* not error to refuse a request for instruction, that if the jury believed the evidence to answer in the affirmative the issue of contributory negligence. *Ibid.*

35. *Master and Servant—Dangerous Instrumentalities—Contributory Negligence—Assumption of Risks—Burden of Proof—Evidence.*—An inexperienced servant was employed to blast with dynamite, and furnished with iron tamping rods for the purpose, the evidence tending to show that the use of these tamping rods caused the explosion causing the injury complained of. A charge *Held* correct, that "Unless the jury find by the greater weight of the evidence that the plaintiff knew of the great danger in using iron tamping rods, and voluntarily and willingly made up his mind to run the great risk incident to using the same, you will answer the issue 'No,' " and that recovery would not be denied unless in the use of tamping rod the apparent danger was so great that its assumption would amount to a reckless indifference to probable consequences. *Ibid.*

36. *Master and Servant—Dangerous Instrumentalities—Assumption of Risks—Evidence.*—The servant assumes the risks ordinarily incident to his employment, but does not assume the risk from dangers which arise from the failure of the master to furnish reasonably safe and suitable tools with which to do the work required of him, unless in the careful performance of the work with the tools furnished the inherent probabilities of injury are greater than those of safety. *Ibid.*

37. *Master and Servant—Negligence—Electricity—Dangerous Instrumentalities—Presumptions.*—A telegraph company is presumed to know of the danger to its employees in stringing its wires over and in close proximity to the live wires of other companies engaged in supplying electricity for light and power purposes, and are held to the highest degree of care in providing proper appliances for the use of its employees in doing the work that its dangerous character requires. *Hicks v. Telegraph Co.,* 519.

38. *Same — Proximity—Contact—Safe Appliances—Evidence—Res Ipsa Loquitur—Questions for Jury.*—A telegraph company's employee was engaged, within the scope of his employment, in stringing telegraph wires above and in close proximity to

MASTER AND SERVANT—*Continued.*

the live wires of another corporation engaged in furnishing electricity for light and power purposes, and there was evidence tending to show that the work was customarily done in such instances by the use of a rope, and that the employee should have been protected by a guard wire to prevent contact between the telegraph wire and the live wires. The employee in catching hold of the telegraph wire with his bare hand, under the orders of his superior, was killed by an electrical shock caused by the telegraph wire coming in contact with the live wire; and in an action by his administrator for damages: *Held*, the fact of the injury, under the circumstances, was sufficient to carry the case to the jury. *Ibid.*

39. *Master and Servant—Dangerous Machinery—Safe Place to Work—Appliances—Negligence.*—It is actionable negligence for the master to fail to provide for his servant employed to work in a plant where the machinery is more or less complicated and driven by mechanical power, a reasonably safe place to work, and implements and appliances reasonably safe and suitable for the work in which he is engaged, such as are approved and in general use in plants of like character. *Rogers v. Manufacturing Co.*, 484.

40. *Same—Evidence.*—The servant was injured while at work in a woodworking plant of the master, at a lathe machine, and introduced evidence tending to show that the cause of the injury was the failure of the defendant to furnish a guard or shield to go over the machine to prevent its throwing splinters and pieces of wood back, and that the guards or shields were approved and in general use in plants of like character: *Held*, sufficient to go to the jury upon the question of defendant's negligence. *Ibid.*

41. *Same—Approved and in General Use.*—In an action by the servant for damages alleged to have been caused him by the failure of the master to furnish a shield or guard for his protection from flying splinters and wood from a lathe, at which he was at work, there was evidence tending to show that such shields and guards were in use in nine different plants of like character as the one at which the plaintiff was at work, and testified to by witnesses of experience to be approved and in general use: *Held*, not error for the trial judge to refuse to instruct the jury that if they find from the evidence that these shields and guards were in use in four places particularized from the evidence, it was not sufficient to show a general custom. *Ibid.*

MASTER AND SERVANT—*Continued.*

42. *Same—Proximate Cause.*—The master failed to provide the servant with an appliance for his protection while working at a machine driven by mechanical power. There was evidence tending to show that the injury complained of would not otherwise have been caused: *Held*, the question of proximate cause does not solely depend upon whether the appliance was known and in general use; for the master would be liable if the injury was caused by the absence of the appliance, if the failure of the master to supply it was a want of reasonable care on his part. *Ibid.*

43. *Master and Servant — Contributory Negligence — Dangerous Conditions—Assumption of Risks.*—The doctrine of contributory negligence, in an action for damages by defendant's engineer caused from a derailment and the unsafe condition of the track and equipment, is not made to depend upon the plaintiff's realization that he is using a defective appliance under dangerous conditions, but upon whether he was negligent in doing the particular work, or that the danger was so obvious that the chances of injury were greater than those of safety. *Worley v. Lumber Co.*, 490.

44. *Master and Servant—Parent and Child—Employment of Child.* A father may stipulate with the employer of his child as to the kind of work his child may be engaged in, unless forbidden by statute, and the consent of the parent that the child may be employed at one kind of labor is not consent that he be put to another and more dangerous kind of work. *Haynie v. Power Co.*, 503.

45. *Same—Contributory Negligence.*—Contributory negligence on the part of a minor child, 13 years old, employed with the consent of the parent to do a certain kind of work, is no defense in an action for personal injury received by the minor while working for the master under more dangerous conditions, to which the parent has not given his consent. *Ibid.*

46. *Master and Servant—Parent and Child—Employment of Child —Negligence—Safe Place to Work—Consent of Parent—Contract—Burden of Proof—Dangerous Surroundings.*—An actionable wrong is committed by the master in putting a minor child, 13 years old, to work under more dangerous conditions, against the consent of his father, than those under which the parent had agreed upon, and evidence of an injury inflicted upon the child while thus employed, without the knowledge or ratification of the parent, is sufficient to take the case to the jury, the burden of proof being on

MASTER AND SERVANT—*Continued.*

the plaintiff to establish the contract of employment in his action for damages for a negligent killing of the child. *Ibid.*

47. *Same—Duty of the Master.*—The master who has employed a minor child with the consent of the parent to work as a water carrier at a certain place, who was injured while at a different place on defendant's property by being thrown from a belt operating defendant's machinery, with evidence tending to show that the defendant had agreed with the parent that the child should not be permitted to go there: *Held,* the master should not be held as an insurer, should the agreement alleged be proven, but only to use due diligence and care to keep the child away from the machinery and at the work he was hired to do, or else return him to his parent. *Ibid.*

MATERIAL MEN. See Liens, 1, 3, 4, 5.

MEASURE OF DAMAGES.

1. *Damages, Compensatory—Punitive Damages.*—When compensatory damages are allowable they should not be confined to an actual pecuniary loss, upon the theory that any recovery above actual loss in money or time having a definite pecuniary value partakes of the nature of punitive damages. *Carmichael v. Telephone Co.*, 21.

2. *Damages, Compensatory—Measure of Damages.*—On an issue as to actual or compensatory damages caused by an injury inflicted, the plaintiff may recover, in proper instances, whatever the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, physical inconvenience and mental suffering or humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. *Ibid.*

3. *Same—Standards of Measurement—Contracts.*—While a recovery for damages for a breach of contract is ordinarily confined to such as are in reasonable contemplation of the parties at the time of making it, which are susceptible of ascertainment with a reasonable degree of certainty, and limited to pecuniary recompense for the loss sustained by the injured party, the position having its origin and basis in the facts that the vast majority of contracts concern themselves with pecuniary values and have the pecuniary standard for adjustment alone in contemplation, the doctrine does not extend to an agreement which clearly has reference to a different standard, for in such cases damages in case of breach must be awarded according to the standard which the parties have adopted. *Ibid.*

MEASURE OF DAMAGES—*Continued.*

4. *Corporations — Public Service — Breach of Contract—Torts—Measure of Damages.*—A telephone company, a public-service corporation operating under a public franchise, is responsible for its breach of duty in rendering the service it has undertaken to perform for one having contractual relationship with it, and when suffering special injury by reason of such breach, he is entitled to sue in tort, and, in case of recovery, to have his damages admeasured as in that character of action. *Ibid.*

5. *Same—Telephone Companies—Payment of Rentals.*—The plaintiff having protested to defendant that he had paid for the rental of his telephone service at his home, claiming he had a receipt therefor which he had temporarily mislaid, but promised to produce, found upon returning home Saturday night that the telephone connection had been severed there in his absence and so continued until the following Monday morning, when he paid under protest and had his telephone service restored. There was conflicting evidence as to whether the plaintiff had actually paid the rental, the company protesting that the receipt was given by mistake as to the amount: *Held,* the plaintiff, when his cause of action has been established, may recover upon the tort arising from defendant's breach of contract. *Ibid.*

6. *Same—Mental Anguish—Duty to Avoid or Minimize.*—The plaintiff, in this case, having a right to sue a telephone company, a public-service corporation, in tort for wrongfully disconnecting his telephone service, evidence on the question of damages was competent which tended to show his suffering and anxiety naturally arising from the fact that his father-in-law was at the time in a hospital, supposed to be in a dangerous condition, which was known to the company, or its managing officers, and occasioned by the loss of the telephone service at such time, but not the suffering and anxiety caused by the placing and condition of the father-in-law; and in awarding any damages imputable to this source, it should be considered whether he did what he reasonably could have done to lessen his anxiety. *Ibid.*

7. *Corporations—Telephones—Public Service—Tort—Willful and Wanton—Punitive Damages.*—In awarding damages to one whose telephone service has wrongfully been disconnected by a public-service telephone corporation, the jury may award such punitive damages in addition to compensatory damages as they may deem right and proper, when, in proper instances, they find the act was done maliciously or under

MEASURE OF DAMAGES—*Continued.*

such circumstances of willfulness on the part of the defendant as to show a wanton or reckless disregard of plaintiff's rights. *Ibid.*

8. *Same—Compensatory Damages—Evidence—Questions for Jury.* Upon the question of allowing exemplary as well as actual damages in this case, as presented, for the disconnection of the plaintiff's service by the defendant telephone company, the jury should consider as circumstances relevant to the inquiry evidence tending to show that the plaintiff informed the defendant of the payment he had made, that he had a receipt therefor, that the defendant still insisted there was no such payment, and further, that the plaintiff had several times made default in payment of his dues, and that the defendant had been informed by its proper agents that plaintiff owed the balance concerning which the service had been disconnected. *Ibid.*

9. *Carriers of Goods—Delayed Delivery—Measure of Damages—Instructions—Agreement of Counsel—Appeal and Error.*—In this action for damages alleged to have been caused by the negligence of defendant carrier in transporting a shipment of goods: *Held*, not error for the trial judge to omit to charge the jury upon the rule of the measure of damages, it appearing that the counsel for both parties had agreed on the trial, in the presence of the jury, and with the sanction of the court, that the damages should be the difference in value between the market price of the goods when delivered and the actual value of the damaged goods, should the defendant be held answerable. *Young v. R. R.*, 74.

10. *Condemnation — Damages — Special Benefits — Offsets.* — In awarding damages against a county for constructing a public road over private property, the owner is compensated for the taking of the property for public use when the benefits he will receive are equal to the value of the land taken. *Phifer v. Commissioners*, 150.

11. *Same — Legislative Authority—Vested Rights—Constitutional Law.*—The Legislature has the constitutional authority to provide that the special benefits to be derived to the owner of lands over which a county constructs a public road shall be an offset against damages sustained by the owner in having his lands thus taken for public use; and this requirement can be changed by the Legislature at any time before the rights of the parties are settled and vested by verdict and judgment. *Ibid.*

MEASURE OF DAMAGES—*Continued.*

12. *Condemnation — Damages — Special Benefits — Offsets.*—Only those benefits which are special to the owner of lands taken by the county in constructing a public road across them can be considered as an offset to the damages claimed by him, and not such as he shares with other persons in similar circumstances, unless the statute provides differently. *Ibid.*

13. *Same—Speculative Damages—Evidence.*—In this action against the county for damages to plaintiff for taking his lands in the construction of a road across them, evidence was competent that the value of the lands would be increased because of the special benefits thus to be derived by the owner, and not objectionable as being speculative or remote. *Ibid.*

14. *Cities and Towns — Streets — Negligence—Abutting Owner—Permanent Damages.*—The damages awarded in an action against a city to an abutting owner by reason of a faulty construction or work in changing the grade of a street by the proper officers of a city are permanent, and cover those which are past, present, and prospective. *Earnhardt v. Commissioners*, 234.

15. *Principal and Agent—Fraud—Worthless Stock—Measure of Damages.*—An agent acting for the interest of his principal in the sale of stock in a corporation which turned out to be insolvent, in violation of an understanding between them that the sale was to be for cash, is not liable to the principal for the cash he was instructed to receive therefor when it appears that the stock could not be sold for cash, and that, acting for the principal as he deemed for his best interest under the circumstances, he took in payment for the stock a promissory note for the face value of the stock, which, without the agent's fault, proved to be worthless, the damages recoverable, at most, being confined to the value of the stock the agent was instructed to sell, which in this case turned out to be valueless. *Osborne v. Durham*, 262.

16. *Punitive Damages — Financial Condition — Measure of Damages—Evidence.*—When punitive damages may be awarded, evidence of the defendant's financial condition is admissible in behalf of the plaintiff. *Arthur v. Henry*, 393.

17. *Measure of Damages—Dangerous Work—Consent—Negligence—Due Care—Questions for Jury.*—In plaintiff's action for damages to his property for the negligent blasting operations of the defendant, there was conflicting evidence as to whether the plaintiff gave the defendant his consent, and thereafter notified him to desist: *Held*, in this case, that the consent

MEASURE OF DAMAGES—*Continued.*

did not imply that the blasting should be done with threatened injury to life and property, and it was for the jury to determine, upon their finding that the consent was given, whether the defendant continued to blast after notice to desist, and whether the defendant continued to blast in a negligent or obviously dangerous manner, such as was inconsistent with due care, or whether from the operations there was no other or further injury to plaintiff's property than was necessarily involved in the operation of the quarry. *Ibid.*

18. *Measure of Damages — Retraxit — Consideration—Evidence—Limitation of Actions.*—When, with competent evidence, the plaintiff has established his right to recover damages to his property caused by the negligent blasting of rock by the defendant, his statement on the witness stand that he asks no damages prior to a certain date within the statutory time, is not a *retraxit* and is without consideration, and does not bar him of his right to recover all the damages he is entitled to not barred by the statute of limitation pleaded by the defendant. *Ibid.*

19. *Trespass — Consequences of Acts—Knowledge—Direct Consequences—Measure of Damages.*—The employees of a telegraph company entering upon the right of way of a railroad company in the construction or maintenance of its telegraph line, within the scope of their agency and in furtherance of the business of the telegraph company, may bind the company in damages to the owner by the violence of their entry, and the use of boisterous and profane language, the singing of lewd songs, and by the entrance into his dwelling and by acting in such a way as to cause injury to his wife from apprehension and mental shock; and evidence that she was in a delicate condition at the time, which aggravated the damage or rendered her more susceptible to the shock from the conduct described, may be considered by the jury in their award upon the issue as to the measure of damages, though the employees may not have been aware of it at the time complained of, when the tortious acts were the immediate, natural, and proximate cause of her injuries. *May v. Telegraph Co.*, 416.

20. *Same—Torts.*—When the tortious acts of the employees of a telegraph company, after rightfully entering on the lands of the owner, cause injury to the wife of the owner, it is not necessary that they should have contemplated the particular injury which their wrongful act produced, but the company

MEASURE OF DAMAGES—*Continued.*

is liable if the wrong was of such a character as to be injurious in its natural and proximate consequences. *Ibid.*

21. *Trespass—Rightful Entry—Unlawful Acts—Evidence—Assault and Battery—Torts—Consequential Damages.*—It is not necessary that the employees of a telegraph company entering rightfully upon the lands of the owner to perform their duties to their employer should actually commit an assault or a battery upon the owner or his family to make the employer liable for the consequent and proximate damages caused by their acts done in violence and in disregard of the owner's rights. *Ibid.*

22. *Trespass — Torts—Mental Suffering—Damages.*—The tortious entry or trespass upon the lands of another supports a right of action for physical injuries resulting from a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, and it is not necessary that there must have been some direct physical injury in order to render the defendant's acts tortious, in a legal sense, and consequently actionable. *Ibid.*

23. *Same—Parties—Owner—Injury to Wife—Recovery by Husband—Measure of Damages.*—The husband may recover in his own name in an action for damages done to his wife in consequence of an unlawful trespass of another for his separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife; and where the injuries are of a permanent nature a recovery by him may be had of such sum as will fairly compensate him for her future diminished capacity to labor, but excluding from the damages recoverable any mental suffering upon his part. *Ibid.*

24. *Same—Punitive Damages.*—Punitive damages may be recovered by the husband for injuries inflicted upon his wife in consequence of an unlawful trespass of another, when the wrong is willful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, as an example to others and to vindicate justice. *Ibid.*

25. *Measure of Damages—Fear and Fright—Physical Suffering.*—In this action for damages alleged to have been caused by the negligence of defendant in blasting with loud noises near the plaintiff's home and causing rocks and débris to fall on the premises, the question of damages was correctly limited by the charge of the court to such as were caused by the acts complained of, and not otherwise, excluding

MEASURE OF DAMAGES—*Continued.*

such as may have been occasioned from fear and fright alone, and which did not cause physical injury. *Arthur v. Henry*, 438.

26. *Measure of Damages—Mental Power—Evidence—Instructions.* In an action to recover damages for a personal injury, an instruction is erroneous which tells the jury they may consider under certain conditions and phases of the evidence, as an element of damages, the loss by plaintiff of his mental powers, etc., when there is no suggestion, at any time, that the plaintiff was unconscious, or that his sufferings were of that character; and in this case a new trial is ordered, confined to the issue of damages. *Worley v. Logging Co.*, 490.

MEMORANDA. See Statutes of Frauds, 1, 2.

MENTAL ANGUISH. See Trespass, 8; Measure of Damages, 25.

MENTAL INCAPACITY. See Evidence, 75, 77.

MINORS. See Constitutional Law, 10, 13.

MORTGAGE.

Deeds and Conveyances — Fraud — Sale of Stock—Mortgages—Misrepresentations — Evidence — Questions for Jury. — Evidence to set aside for fraud a mortgage deed given to the defendant by plaintiff to secure money with which to purchase stock the defendant was offering for sale examined and held to be sufficient for submission to the jury. *Brite v. Penny*, 110.

MOTION IN ARREST. See Motions, 19.

MOTIONS.

1. *Evidence—Depositions—Motion to Quash—Objections and Exceptions—Practice.*—A deposition can be quashed only for irregularities in the taking or the incompetency of the witness, and exception should be taken to the questions and answers of the deponent and not by motion to quash the depositions. *Jeffords v. Waterworks Co.*, 10.

2. *Evidence—Depositions—Commission—Name of Witness—Practice.*—It is not necessary that the commission issued for taking depositions name the particular witness to whose depositions exception is taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. Revisal, 1652. *Ibid.*

MOTIONS—*Continued.*

3. *Appeal and Error—Failure to Docket—Motion to Dismiss—Practice.*—A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of Court to which the appeal is returnable, and before the case is docketed. Supreme Court Rule 17. *Mirror Co. v. Casualty Co.*, 28.

4. *Same.*—When the appellant dockets his case on appeal in the Supreme Court at any time after the end of the term to which it is returnable, it will be dismissed, on motion. *Ibid.*

5. *Same—Motion to Reinstate.*—An appellant is required by Rule 17 of the Supreme Court to move for a reinstatement of his case, after its dismissal upon motion of appellee, during the same term of the Court. *Ibid.*

6. *Appeal and Error—Appeal Abandoned—Motion to Dismiss—Practice.*—When it appeared from the record on file in the Supreme Court that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed. *Ibid.*

7. *Appeal and Error—Objections and Exceptions—Answers of Witness—Evidence—Motion to Strike Out—Procedure.*—If an answer by the witness to a competent question is not excepted to, the competency of the answer will not be considered on appeal under an exception noted to the question. The objecting party should either have excepted to the answer at the time it was made or move the trial judge to strike it from the evidence. *Wacksmuth v. R. R.*, 34.

8. *Judgments—Motion to Set Aside—Excusable Neglect.*—Upon motion to set aside a judgment on the ground of excusable neglect, by nonresident defendants, it must appear that the motion was made within twelve months from the rendition of the judgment. *Currie v. Mining Co.*, 209.

9. *Judgments—Parties—Not Resident—Motion to Set Aside—Interpretation of Statutes.*—A judgment obtained upon service by publication of summons will not be set aside under the provisions of Revisal, sec. 449, upon motion made by defendant more than twelve months after its rendition. *Ibid.*

10. *Judgments—Irregular—Definition.*—An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside, upon motion, within a reasonable time when a meritorious defense is shown. *Ibid.*

11. *Appeal and Error—Second Appeal—Motion to Rehear—Procedure.*—A second appeal on matters determined by a deci-

MOTIONS—*Continued.*

sion on a former appeal will not be considered, the procedure being in the Supreme Court by a motion to rehear. *Hospital v. R. R.*, 460.

12. *Judgment—Motion in Arrest—Conviction—Indictment.*—A motion in arrest of judgment will not be allowed after conviction, for the reason that a bill of indictment charging the unlawful manufacture and sale of spirituous, etc., liquors did not state the date of the commission of the alleged offense or the county in which it had been committed. *S. v. Francis*, 612.

13. *Same—Defects in Bill.*—To sustain a motion in arrest of judgment after verdict for defects in the indictment, it must appear that the bill is so defective that a judgment cannot be pronounced upon a verdict thereunder. *Ibid.*

14. *Same—Captions of Bill.*—An omission in the caption of a bill of indictment cannot be a ground for arresting a judgment under the indictment, for the caption is not a part of the bill in this sense. *Ibid.*

15. *Judgment—Motion in Arrest—Conviction—Indictment—Allegations—Term of Court—Procedure.*—Omitting to state the term of the court at which a true bill is found is not a sufficient ground upon which to sustain a motion in arrest of judgment; especially so when from the record it appears at what term the bill was returned. *Ibid.*

16. *Judgments—Motion in Arrest—Indictment—Allegations—Time of Offense.*—Time is not of the essence of the offense charged in a bill of indictment, and the failure of the bill to allege it is not a defect upon which the judgment will be arrested after verdict. *Ibid.*

17. *Judgment—Motion in Arrest—Statutory Period—Instructions—Burden of Proof.*—When for conviction it is necessary to show the offense was committed within two years, the burden is upon the State to show it, which may be taken advantage of by the prisoner by a special request for instructions, and not by a motion in arrest of judgment after verdict. *Ibid.*

18. *Streams—Water Supply—Pollution—Conviction—Motion in Arrest—Bill of Particulars—Procedure.*—Upon a charge and conviction for polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), a motion made in arrest of judgment upon the ground that it was not made to appear which stream the prisoner was charged with polluting, will not be sustained, the proper procedure being upon motion for a bill of particulars (Revisal, sec. 3244). *S. v. Corbin*, 619.

MOTIONS—*Continued.*

19. *Indictment — Housebreaking—"Felonious"—Motion in Arrest of Judgment.*—An indictment under Revisal, sec. 3333, for housebreaking, is sufficient when charging "that defendant did break and enter (otherwise than burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., etc., feloniously to steal, etc.," and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony"; and a motion in arrest of judgment on that ground should be denied. *S. v. Goffney*, 624.

MOTIVE. See Homicide, 18.

MOTOR VEHICLES. See Highways, 1, 2, 3.

MUNICIPAL CORPORATIONS.

1. *Precincts — Quasi-municipal Corporations — Powers.*—In this case *Held*, that Kings Mountain Precinct in No. 4 Township, Cleveland County, is a quasi-municipal corporation created by the State and vested with certain corporate powers. *Smith v. School Trustees*, 141 N. C., 143; *Board of Trustees v. Webb*, 155 N. C., 379, cited and applied. *Commissioners v. Bank*, 191.

2. *Bond Issues—Precincts—Legislative Authority—Sinking Funds — Restricted Levy — Negotiable Instruments — Particular Fund.*—A legislative act empowering the issuance of bonds by a precinct for building and maintaining, etc., its public roads, authorizing taxes to be computed and levied on all taxable property therein, does not restrict the payment of the bonds so as to render them nonnegotiable by providing a maximum rate of taxation upon the property and poll; and, further, that "no sinking fund shall be created within less than ten years from the date of issuing said bonds," but allowing the properly constituted authorities to use, for the purposes of the act, "such sums of money remaining after the interest on said bonds shall have been paid"; and the bonds issued thereunder containing an unconditional promise to pay a sum certain in money at a fixed time to bearer, are a compliance within the provision of our negotiable instrument act as to the negotiability of a paper, which indicates a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount. *Ibid.*

3. *Bond Issues—Precincts—Legislative Authority—Tax Levy—Restrictions—Payment—Negotiable Instruments.*—A legisla-

MUNICIPAL CORPORATIONS—*Continued.*

tive authority to a precinct to issue bonds and levy taxes on all taxable property for the purposes of the act, does not affect the ultimate liability of the precinct for their payment in full by restricting the tax levy to a certain amount upon the property and poll. *Ibid.*

MURDER. See Homicide.

MUTILATION OF RECORDS. See Indictment, 5, 6, 8, 9, 10, 11, 12.

NECESSARIES. See Bond Issues, 2.

NEGLIGENCE. See Contributory Negligence; Evidence, 22, 23, 24, 25, 26, 63, 64, 65, 78, 80.

1. *Highways—Automobiles—Negligence—Evidence—Nonsuit.*—In an action for damages for personal injury received by reason of the team plaintiff was driving becoming frightened from a motor vehicle approaching from the rear, there was evidence tending to show that the speed of the automobile greatly exceeded the limit prescribed by the Laws of 1909, ch. 445, and that the machine was upon the plaintiff's team without adequate warning and without giving him "any chance to hold on to his horses": *Held*, sufficient to go to the jury upon the question of defendant's actionable negligence, not so much and of itself that the speed limit was exceeded, but tending to show the defendant's negligence in not doing what the circumstances reasonably required for the plaintiff's safety; and upon conflicting evidence, a motion to nonsuit should be denied. *Curry v. Fleer*, 16.

2. *Railroads — Negligence — Relief Department — Acceptance of Benefits — Written Contract — Parol Evidence.* — The word "benefits" as ordinarily used in the regulations of a railroad company's relief department does not include hospital treatment and medical attention; and as it is the acceptance by a member of that department of the benefits thereunder which may, in proper cases, bar his recovery for damages for a personal injury negligently inflicted by the company, and as the act of acceptance, when in dispute, is not included in any part of the written contract embraced in the regulations, it may be shown or disproved by parol evidence of the circumstances connected with it. *Wacksmuth v. R. R.*, 34.

3. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Contracts—Evidence.*—When in defense to an action for damages for personal injuries inflicted upon an employee, a railroad company relies upon the acceptance of benefits by the employee as a member of its relief depart-

NEGLIGENCE—*Continued.*

ment as a bar under the rules and regulations of the department, it is competent for the plaintiff, as tending to avoid the bar, to show that he had accepted the benefits under the assurance of the defendant that it would do certain things in regard to keeping him as an employee, etc., which it had failed to do, and that, relying on this promise, he had accepted the benefits; and evidence in this case *Held* sufficient to sustain a verdict in plaintiff's favor on the issue as to whether the plaintiff, after his injury, voluntarily accepted the benefits under his contract. *Ibid.*

4. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Promise—Contracts—Burden of Proof—Evidence—Questions for Jury.*—It is a voluntary acceptance by an employee, a member of a railroad company's relief department, of the benefits of that department, after an injury has been inflicted, that bars his right to recover damages from the company; and when the defense in the action is that the plaintiff had promised to accept the benefits, it is necessary for the defendant to show an acceptance of the promise and its performance thereof in order to render the defense available. *King v. R. R., post,* 44, cited as controlling. *Ibid.*

5. *Railroads—Negligence—Relief Department—Acceptance of Benefits — Equity — Credits on Judgment — Procedure.*—As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances, is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered. *Ibid.*

6. *Railroads — Relief Department—Benefits Received—Personal Injuries — Negligence — Judgment—Credits.*—When an employee of a railroad company has accepted benefits from its relief department under conditions permitting recovery for personal injuries negligently inflicted on him, the amount of the benefits received should be credited on the judgment. *King v. R. R.,* 44.

7. *Carriers of Goods—Delayed Delivery—Reasonable Time—Consignee's Readiness—Negligence—Evidence.*—When, in an action by the shipper against the carrier for damages to a shipment of fruit trees to his sales agent, alleged to have been caused by the carrier's negligence in an unreasonable delay in transportation and delivery, the defense is relied on that the plaintiff's agent was not ready to receive them when they arrived, it is competent for the plaintiff to show,

NEGLIGENCE—*Continued.*

in explanation why his agent did not wait for their arrival and upon the measure of damages, that orders had been obtained for the trees by traveling agents upon a salary, and they had been sold for a certain aggregate sum to various parties to be delivered when they called for them at destination upon notice at a certain time; and, also, an order from one of plaintiff's customers requiring the trees to be delivered accordingly. *Young v. R. R.*, 74.

8. *Carriers of Goods—Negligence—Delayed Delivery—Consignee's Readiness—Issues, Relation of—Instructions.*—In an action for damages to a shipment of goods, alleging that they were caused by the failure of the carrier to transport them within a reasonable time, the first issue related to the reasonableness of the time of transportation, the second as to the injury caused thereby, and the third as to the amount of damages: *Held*, no error of the trial judge to instruct the jury in reference to the relations of the issues to each other, that if they answered the first issue "Yes," they should go to the next issue; and if they answered the second issue "Yes," they should find the damages under the third; and that if they should answer the first issue "No," they need not go further, but return their verdict. *Ibid.*

9. *Contracts — Independent Contractor—Negligence—Supervision —Right to Terminate.*—A responsible party who has contracted to complete a work in its entirety, in this case a mill, is an independent contractor and solely liable as such for damages for personal injuries to an employee working upon its construction; and the fact that the contract with the owner provides for the inspection of the work by the engineer of the latter to ascertain that it comes up to the plans and specifications he has furnished therefor, with clauses of forfeiture under the contract if it does not; and that the engineer may require the contractor under like conditions to put on an extra force to complete the work, if in his judgment it is necessary to do so to bring it within the time agreed upon, do not alter the relationship of independent contractor so as to make the owner liable for damages for his negligence. *Denny v. Burlington*, 155 N. C., 33, cited as controlling. *Hopper v. Ordway*, 125.

10. *Master and Servant—Safe Place to Work—Safe Appliances—Dangerous Machinery—Negligence.*—An employer of labor must furnish the employee a place to do the work assigned to him as reasonably safe as the nature of the business will admit, and when the employment is in the operation of mills

NEGLIGENCE—*Continued.*

and other plants having machinery more or less complicated, and driven by mechanical power, he is required to provide methods, implements, and appliances such as are known, approved, and in general use. *Walker v. Manufacturing Co.*, 138.

11. *Railroads—Master and Servant—Defective Appliances—Negligence—Evidence.*—When there is evidence tending to show that the eye of the engineer of the defendant railroad company was injured by an explosion of the water-glass in the cab of his locomotive, while in the discharge of his duties, and that the injury could not have happened had the defendant, after notice, supplied the water-glass with the usual shield or guard in general use by railroad companies, it is sufficient upon the question of defendant's negligence. *Horton v. R. R.*, 146.

12. *Cities and Towns—Highways—Streets—Abutting Owner—Negligence—Damages.*—As a rule, the abutting owner may not recover damages in his action against a municipality for diminution in the value of his property caused by a duly authorized change of grade in an established street, except when the work has been done in an unskillful or negligent manner, so as to proximately cause the damages claimed. *Earnhardt v. Commissioners*, 234.

13. *Carriers of Goods—Negligence—Contract Against Negligence—Waiver.*—A stipulation in a carrier's live-stock bill of lading which arbitrarily fixes a maximum valuation of the stock shipped and recoverable thereunder, without examination of the stock or any *bona fide* effort to arrive at their value, is, to the extent that it is inadequate, a contract against the consequence of the negligent acts of the carrier, and invalid; and the acts of the consignor in making the shipment under a bill of lading of this character will not be construed as a waiver of the effect of the negligent acts of the carrier inflicting injury to the stock. *Ibid.*

14. *Carriers of Goods — Public Policy — Contract Against Negligence—Interstate Commerce Commission.*—A ruling of the Interstate Commerce Commission designed and intended simply as a regulation establishing a reasonable and proper freight rate for the shipment of live stock, without more, cannot affect the principle prevailing in this State, that the provision in a live-stock bill of lading which arbitrarily fixes the maximum amount recoverable is void as a contract on the carrier's part against its own negligence. *Ibid.*

NEGLIGENCE—*Continued.*

15. *Cities and Towns — Streets and Sidewalks — Excavations — Guards and Lights—Negligence—Contributory Negligence—Evidence—Questions for Jury.*—In an action against a city or incorporated town for damages sustained by a pedestrian in falling, at night, into an open ditch made for the purpose of laying water or sewer pipes by the defendant's contractor, alleging negligence on defendant's part in not having it properly guarded, the question of defendant's negligence upon conflicting evidence is one for the jury. *Bailey v. Winston*, 252.

16. *Cities and Towns—Excavations—Dangerous Conditions—Pedestrians—Lights and Guards—Ordinary Care—Negligence.* It is the duty of a city or incorporated town to exercise ordinary care in guarding dangerous places in the streets, caused by ditches and excavations made in pursuance of its authority, with proper lights and barriers for the safety of pedestrians at night. *Ibid.*

17. *Cities and Towns—Streets and Highways—Dangerous Conditions—Reasonable Care—Supervision.*—A municipality owes it as an absolute duty to put its streets and highways in passable condition and to keep them so by the exercise of reasonable and continuing care and supervision for the safe use of pedestrians thereon. *Ibid.*

18. *Same — Defects—Notice, Express or Implied—Supervision.*—The ordinary liability of a municipality to a pedestrian injured by negligent defects in its streets or sidewalks depends upon whether the municipality had actual notice of the defect, or notice implied from the circumstances, as where the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision. *Ibid.*

19. *Cities and Towns—Streets and Highways—Dangerous Conditions—Positive Duty—Contractor—Negligence.*—The duty of a municipality to keep its streets and sidewalks in repair and free from dangerous pitfalls is a positive one, which it cannot delegate to others to perform so as to relieve itself from liability for nonperformance, or for negligence in the manner of doing the requisite work in the proper way. *Ibid.*

20. *Same—Wrongful Acts—Fixed Notice.*—The doctrine as to implied notice of a defect in a street or sidewalk, which causes an injury to a pedestrian, is not applicable when the very danger is created by the municipality itself or by some one under its direction, for then it is fixed with notice and liable for the damages proximately resulting from its negligence. *Ibid.*

NEGLIGENCE—*Continued.*

21. *Cities and Towns—Streets and Highways—Dangerous Conditions — Positive Duty—Contractor—Negligence—Liability of City.*—A city may not contract with another to make excavations in its streets or sidewalks, which it is authorized to do, and thereby escape liability for the negligent acts of its contractor, which cause an injury to a pedestrian. *Ibid.*

22. *Railroads—Negligence—Personal Injury—Light or Warnings—Contributory Negligence — Evidence — Nonsuit.* — Evidence tending to show that plaintiff was injured on a dark and cold night with a strong wind blowing, as he was walking along a path by the railroad track, about 2 feet from the end of the cross-ties, by being struck by defendant's switch engine running backward without lights or other warnings of its approach, is sufficient upon the question of defendant's negligence, and while it may be possible in this case that the plaintiff was himself negligent in walking too near the track or attempting to cross it without looking and listening, contributory negligence cannot be inferred as a matter of law, and a motion to nonsuit upon the evidence should not be sustained. *Hammett v. R. R.*, 322.

23. *Master and Servant—Driver of Teams—Negligence—Scope of Employment—Respondeat Superior.*—The master is not responsible for the negligent acts of the servant employed for the ordinary duty of driving a team of mules hitched to a wagon for the purpose of hauling lumber, in causing an injury to one whom, in the absence of the master and without his knowledge, express or implied, he had permitted to ride on the wagon loaded with lumber; for such acts are beyond the scope of the servant's employment, and not done in furtherance of the duties owed by the servant to the master. *Dover v. Manufacturing Co.*, 324.

24. *Railroads—Use of Track—Time Permit—Collision—Negligence—Counter Damage—Questions of Law.*—The plaintiff railroad company received permission from the defendant railroad company for its train to go upon the latter's main line for the space of ten minutes for the purpose of placing cars upon a siding to be taken by the latter's train. While doing so, the train of the defendant, imminently expected, arrived and collided with the plaintiff's train where the track was straight and unobstructed for a mile: *Held*, whether the collision occurred within or beyond the time limit permitted, the defendant cannot recover on its counter-case for damages, as plaintiff's entry on its track was by its permission, and the attendant circumstances showed that by the exercise

NEGLIGENCE—*Continued.*

of reasonable care the defendant's employees had ample opportunity to have stopped its train and avoided the injury. *R. R. v. R. R.*, 369.

25. *Cities and Towns—Liability—Independent Contractor—Negligence—Streets and Sidewalks—Pedestrians.*—The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, whether the work is being done by a licensee or by an independent contractor. *Carrick v. Power Co.*, 378.

26. *Same—Liability of Independent Contractor.*—The same principle of liability as applied to a city's responsibility for the acts of its independent contractor concerning dangerous places negligently left on its streets and sidewalks applies to the city's contractor who sublets the work to an independent contractor—that is, when the work that is being done for their benefit or by their procurement is of the kind to create a nuisance unless special care is taken, they are charged with the duty of safeguarding it, and they may not relieve themselves by delegating this duty to others. *Ibid.*

27. *Same—Character of Work.*—One who has contracted with a city to do work upon its streets and sidewalks may not avoid liability upon the defense that the work was being done for him by an independent contractor, when the negligence complained of was leaving at night a hole 2 feet square at the opening and 4 or 5 feet deep on the edge of a sidewalk; extending partly in and leaving only a space of 3 to 5 feet for pedestrians to pass in going to or from their work along an unlighted street, without guard or signal lights of the danger. *Ibid.*

28. *Contracts—Independent Contractor—Negligence — Supervision.* When a contractor has undertaken to do a piece of work according to plans and specifications furnished and under an agreement for its completion such as otherwise to make him an independent contractor for whose negligent acts the owner or proprietor is not responsible, this relationship is not necessarily affected or changed because the right is reserved for the engineer, architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that it is done pursuant to the terms of the contract. *Johnson v. R. R.*, 382.

NEGLIGENCE—*Continued.*

29. *Contracts — Independent Contractor — Negligence — Collateral Employment—Respondeat Superior.*—The owner or proprietor of work to be done by an independent contractor cannot escape liability upon the ground that an injury was inflicted by the act of an independent contractor, when the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not acting *bona fide* under the terms of the contract, but was, in fact, only the agent of the owner or proprietor in the work that plaintiff was engaged in doing. *Young v. Lumber Co.*, 147 N. C., 26, cited and applied. *Ibid.*

30. *Measure of Damages—Dangerous Work—Consent—Negligence—Due Care—Questions for Jury.*—In plaintiff's action for damages to his property for the negligent blasting operations of the defendant, there was conflicting evidence as to whether the plaintiff gave the defendant his consent, and thereafter notified him to desist: *Held*, in this case, that the consent did not imply that the blasting should be done with threatened injury to life and property, and it was for the jury to determine, upon their finding that the consent was given, whether the defendant continued to blast after notice to desist, and whether the defendant continued to blast in a negligent or obviously dangerous manner, such as was inconsistent with due care, or whether from the operations there was no other or further injury to plaintiff's property than was necessarily involved in the operation of the quarry. *Arthur v. Henry*, 393.

31. *Issues—Negligence—Several Acts—Instructions.*—When in an action for damages alleged by reason of defendants' negligence in inflicting a personal injury on the plaintiff, several acts of negligence are relied on and there is evidence to support them, it is proper for the trial judge to submit separate charges as to each, presenting the contentions of the plaintiff, upon which the issue of negligence may be answered in the affirmative, and to tell the jury that if they do not find the facts as contended, that the defendant would not be negligent in that respect. *Patterson v. Nichols*, 406.

32. *Negligence — Instructions — Confusing — Appeal and Error.*—When damages are sought for a personal injury alleged to have been negligently inflicted, a request for special instruction on the question of contributory negligence is confusing and should be refused, which directs an affirmative answer, if the jury found as a fact that the plaintiff "was negligent in any degree." *Brazille v. Barytes Co.*, 454.

33. *Master and Servant—Negligence—Electricity—Dangerous Instrumentalities—Presumptions.*—A telegraph company is pre-

NEGLIGENCE—*Continued.*

sumed to know of the danger to its employees in stringing its wires over and in close proximity to the live wires of other companies engaged in supplying electricity for light and power purposes, and are held to the highest degree of care in providing proper appliances for the use of its employees in doing the work that its dangerous character requires. *Hicks v. Telegraph Co.*, 519.

34. *Same—Proximity—Contact—Safe Appliances—Evidence—Res Ipsa Loquitur—Questions for Jury.*—A telegraph company's employee was engaged, within the scope of his employment, in stringing telegraph wires above and in close proximity to the live wires of another corporation engaged in furnishing electricity for light and power purposes, and there was evidence tending to show that the work was customarily done in such instances by the use of a rope, and that the employee should have been protected by a guard wire to prevent contact between the telegraph wire and the live wires. The employee in catching hold of the telegraph wire with his bare hand, under the orders of his superior, was killed by an electrical shock caused by the telegraph wire coming in contact with the live wire; and in an action by his administrator for damages: *Held*, the fact of the injury, under the circumstances, was sufficient to carry the case to the jury. *Ibid.*

35. *Negligence—Electricity—Dangerous Instrumentalities—Fellow-servant—Instructions—Appeal and Error.*—When there is evidence tending to show that the plaintiff's intestate was killed by the negligence of the defendant in failing to furnish him a proper appliance for stretching its telegraph wires over and in close proximity to heavily charged wires of another company furnishing electricity for light and power purposes, or in providing a guard wire to prevent contact between the telegraph wire he was handling and the live wire of the other corporation, which caused the injury, a modification of a prayer for special instruction upon the application of the doctrine of the liability of the defendant for the negligence of a fellow-servant is not material, when it appears that the trial judge instructed the jury that if the injury was proximately caused by the negligent act of the fellow-servant the plaintiff could not recover. *Ibid.*

36. *Negligence—Dangerous Instrumentalities — Care Required.*—Persons and corporations dealing with electricity are held to the highest degree of care in maintenance and inspection of their wires, through which deadly currents of electricity

NEGLIGENCE—*Continued.*

pass, and of guy or other wires which may come in contact with the live wires, to the menace of human life. *Ferrell v. Cotton Mills*, 528.

37. *Same—Children—Invitation Implied—Trespass.*—The defendant permitted a guy wire of its electric pole to become loose from its fastening in the ground and to hang down its pole at an exposed and uninclosed place within a few inches from a naked or uninsulated wire charged with a deadly or high voltage of electricity. This hanging guy wire was attractive to the boys, who would swing on it from the pole and back again, and who would congregate there for the purpose. About eight months after the guy wire became loose, the plaintiff's intestate, his 6-year-old son, while swinging, as indicated, was instantly killed by electricity passing suddenly through the guy wire from contact with a highly charged wire carrying the current: *Held*, the defendant knew or should have known of the dangerous conditions existing, and that children would be attracted to and were accustomed to play with the loose guy wire, and the technical defense that the plaintiff's intestate was a trespasser would be unavailing. *Ibid.*

38. *Negligence—Electricity—Children—Invitation Implied—Warning.*—Where the defendant is negligent in permitting a loose guy wire to hang from a pole whereon there were wires carrying a high or deadly voltage of electricity to its plant, left unguarded and uninclosed, and knew or should have known that the small children of the neighborhood were accustomed to swing on the wire, and had permitted this condition to exist for several months, when it could readily have been rendered harmless, the fact that the defendant's watchman had previously told the boys to stay away from the pole is no defense in an action for damages for the death of one of the boys, 6 years of age, killed by a current of electricity while swinging on the lose guy wire. *Ibid.*

39. *Electricity—Dangerous Instrumentalities—Negligence — Location of Poles—Control—Evidence.*—The plaintiff rented from the defendant one of the tenement-houses at its mill used by its employees, and the plaintiff's intestate, his 6-year-old son, was killed while swinging on a loose guy wire from a pole carrying wires charged with a deadly current of electricity, under circumstances tending to show negligence on the defendant's part. There was no evidence tending to show that any one except defendant had charge of this pole,

NEGLIGENCE—*Continued.*

or had authority to remedy any defects in or about it: *Held*, the defendant's liability did not depend on the question as to whether the pole was on or off the premises which it had rented to the plaintiff. *Ibid.*

40. *Electricity — Dangerous Instrumentalities—Children—Parents —Contributory Negligence—Questions for Jury.*—When the evidence tends to show that the plaintiff's intestate, his 6-year-old son, was killed through the negligence of the defendant by a deadly current of electricity from its wires on a pole passing into a loose guy wire whereon the intestate was swinging, as children in the neighborhood were accustomed to do, under dangerous conditions which had previously existed for several months, the pole being uninclosed and unguarded near the home of the plaintiff; that the father was away from home at the time, engaged in his business, and the mother was taking care of her household duties, having a family of several children, it will not be held as a matter of law that the alleged negligence of the parents, in permitting their child to play with the wire, barred a recovery of damages for the wrongful death of the intestate. *Ibid.*

41. *Electricity—Dangerous Instrumentalities—Negligence—Rule of Prudent Man—Proximate Cause.*—The plaintiff's intestate, his 6-year-old son, was killed by receiving a shock from a loose guy wire hanging from defendant's pole situated near his dwelling, under evidence tending to show that the injury was inflicted through the defendant's negligence. A charge held correct, that if the jury found that a reasonably prudent man ordinarily would have permitted the wire to remain in that condition at that place it would not be the negligence of the defendant, and that recovery could not be had if the conditions were not the proximate cause of the death. *Ibid.*

42. *Electricity—Poles—Curtilage.*—A pole used to support wires charged with electricity to supply a cotton mill plant, situated, without inclosure, where the employees of the mill resided, at or near the corner of an uninclosed garden patch, only a short distance from the home of an employee, is sufficient for an inference that it was within the curtilage of the employee. *Ibid.*

43. *Negligence — Action — Evidence — Nonsuit.*—When it appears that an injury, the subject of an action for damages, was the result of an accident concerning which the evidence fails to account, a judgment of nonsuit is proper. *Whitener v. R. R.*, 564.

NEGLIGENCE—*Continued.*

44. *Negligence — Contributory Negligence — Questions for Jury.*—Whether the brakeman on defendant's train was guilty of contributory negligence or whether the plaintiff was negligent in this case, are for the jury, the evidence on plaintiff's part tending to show that the injury was inflicted by the defendant's negligence in sending cars down a heavy grade of track without proper brakes or an engine attached. *Keller v. Fiber Co.*, 575.

45. *Master and Servant—Dangerous Machinery—Safe Place to Work—Appliances—Negligence.*—It is actionable negligence for the master to fail to provide for his servant employed to work in a plant where the machinery is more or less complicated and driven by mechanical power, a reasonably safe place to work, and implements and appliances reasonably safe and suitable for the work in which he is engaged, such as are approved and in general use in plants of like character. *Rogers v. Manufacturing Co.*, 484.

46. *Same—Evidence.*—The servant was injured while at work in a woodworking plant of the master, at a lathe machine, and introduced evidence tending to show that the cause of the injury was the failure of the defendant to furnish a guard or shield to go over the machine to prevent its throwing splinters and pieces of wood back, and that the guards or shields were approved and in general use in plants of like character: *Held*, sufficient to go to the jury upon the question of defendant's negligence. *Ibid.*

47. *Same—Approved and in General Use.*—In an action by the servant for damages alleged to have been caused him by the failure of the master to furnish a shield or guard for his protection from flying splinters and wood from a lathe, at which he was at work, there was evidence tending to show that such shields and guards were in use in nine different plants of like character as the one at which the plaintiff was at work, and testified to by witnesses of experience to be approved and in general use: *Held*, not error for the trial judge to refuse to instruct the jury that if they find from the evidence that these shields and guards were in use in four places particularized from the evidence, it was not sufficient to show a general custom. *Ibid.*

48. *Same—Proximate Cause.*—The master failed to provide the servant with an appliance for his protection, while working at a machine driven by mechanical power. There was evidence tending to show that the injury complained of would not otherwise have been caused: *Held*, the question of prox-

NEGLIGENCE—*Continued.*

imate cause does not solely depend upon whether the appliance was known and in general use; for the master would be liable if the injury was caused by the absence of the appliance, if the failure of the master to supply it was a want of reasonable care on his part. *Ibid.*

49. *Railroads—Negligence—Derailment—Unsafe Road—Appliances—Presumptions—Verdict, Directing.*—When the evidence is not conflicting and tends to show that the plaintiff was injured while operating defendant's train, by a derailment upon an unsafe roadbed, with unusually dangerous grades and curves, and that the equipment used was defective, the trial judge may properly direct the jury to answer the issue as to negligence in the affirmative if they found the facts to be as testified. *Worley v. Logging Co.*, 490.

50. *Same—Principal and Agent—Disobedience to Orders—Further Orders — Vice-principal — Evidence—Instructions.*—When in an action for damages to an engineer operating defendant's train run by steam power, there is evidence tending to show that the injury complained of was caused by a derailment upon an unsafe roadway, and that in the train was a very unsafe car which the superintendent of the defendant company told the plaintiff not to take upon his train again, with further evidence that the car was thereafter loaded with lumber and the plaintiff instructed by another vice-principal of the defendant to take it with him on the occasion of the injury: *Held*, there being no evidence on defendant's part tending to show that its employee who instructed the plaintiff to take the loaded car on the train was not a vice-principal of defendant of equal dignity of the superintendent, it could not avail itself of an instruction precluding recovery if the jury found that the injury would not have occurred had plaintiff obeyed the order of the superintendent not to take the car out again. *Ibid.*

51. *Master and Servant—Parent and Child—Employment of Child—Negligence—Safe Place to Work—Consent of Parent—Contract—Burden of Proof—Dangerous Surroundings.*—An actionable wrong is committed by the master in putting a minor child, 13 years old, to work under more dangerous conditions, against the consent of his father, than those under which the parent had agreed upon, and evidence of an injury inflicted upon the child while thus employed, without the knowledge or ratification of the parent, is sufficient to take the case to the jury, the burden of proof being on the plaintiff to establish the contract of employment in his action for damages for a negligent killing of the child. *Haynie v. Power Co.*, 503.

NEGLIGENCE—*Continued.*

52. *Same—Duty of the Master.*—The master who has employed a minor child with the consent of the parent to work as a water carrier at a certain place, who was injured while at a different place on defendant's property by being thrown from a belt operating defendant's machinery, with evidence tending to show that the defendant had agreed with the parent that the child should not be permitted to go there: *Held,* the master should not be held as an insurer, should the agreement alleged be proven, but only to use due diligence and care to keep the child away from the machinery and at the work he was hired to do, or else return him to his parent. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NONRESIDENTS. See Parties, 1; Motions, 9; Process; Judgments, 4.

NONSUIT. See Evidence, 12, 46, 51, 71, 76, 94.

1. *Nonsuit—New Action—Twelve Months—Limitation of Actions.* The provision of Revisal, sec. 370, that after nonsuit the plaintiff may commence a new action on the same subject-matter within twelve months was not intended to abridge the time within which actions of that character may be brought, but to extend it. *Lumber Co. v. Hayes,* 333.

2. *Same—Trespass—Timber Trees.*—In an action for damages for trespass and cutting timber trees, the action may be again commenced more than twelve months after judgment of nonsuit if not otherwise barred by the statute of limitations applicable. *Meekins v. R. R.,* 131 N. C., 1; *Trull v. R. R.,* 151 N. C., 547, cited and distinguished. *Ibid.*

3. *Negligence—Action — Evidence — Nonsuit.*—When it appears that an injury, the subject of an action for damages, was the result of an accident concerning which the evidence fails to account, a judgment of nonsuit is proper. *Whitener v. R. R.,* 564.

NONUSER. See Railroads, 29.

NOTICE. See Deeds and Conveyances, 10; Evidence, 25; Liens, 3; Negligence, 18; Waiver, 2; Habeas Corpus, 1; Principal and Agent, 8; Master and Servant.

NOTES. See Bills and Notes.

OBJECTIONS AND EXCEPTIONS. See Practice, 1, 3; Appeal and Error, 10, 20, 22, 42, 44, 46, 47, 51, 52, 53, 54; Reference, 9, 10.

OCCUPANCY. See Railroads, 29.

OFFICERS. See Principal and Agent.

OFFICIAL ACTS. See Corporations, 3, 4.

OFFSETS. See Easements, 1, 2, 3, 4.

OPINION. See Evidence, 4.

ORDINANCE. See Cities and Towns, 20.

PARENT AND CHILD. See Habeas Corpus, 1; Contributory Negligence, 13.

1. *Master and Servant—Parent and Child—Employment of Child.* A father may stipulate with the employer of his child as to the kind of work his child may be engaged in, unless forbidden by statute, and the consent of the parent that the child may be employed at one kind of labor is not consent that he be put to another and more dangerous kind of work. *Haynie v. Power Co.*, 503.

2. *Same—Contributory Negligence.*—Contributory negligence on the part of a minor child, 13 years old, employed with the consent of the parent to do a certain kind of work, is no defense in an action for personal injury received by the minor while working for the master under more dangerous conditions, to which the parent has not given his consent. *Ibid.*

3. *Master and Servant—Parent and Child—Employment of Child—Negligence—Safe Place to Work—Consent of Parent—Contract—Burden of Proof—Dangerous Surroundings.*—An actionable wrong is committed by the master in putting a minor child, 13 years old, to work under more dangerous conditions, against the consent of his father, than those under which the parent had agreed upon, and evidence of an injury inflicted upon the child while thus employed, without the knowledge or ratification of the parent, is sufficient to take the case to the jury, the burden of proof being on the plaintiff to establish the contract of employment in his action for damages for a negligent killing of the child. *Ibid.*

4. *Same—Duty of the Master.*—The master who has employed a minor child with the consent of the parent to work as a water carrier at a certain place, who was injured while at a different place on defendant's property by being thrown from a belt operating defendant's machinery, with evidence tending to show that the defendant had agreed with the parent that the child should not be permitted to go there: *Held,*

PARENT AND CHILD—*Continued.*

the master should not be held as an insurer, should the agreement alleged be proven, but only to use due diligence and care to keep the child away from the machinery and at the work he was hired to do, or else return him to his parent. *Ibid.*

5. *Parent and Child—Property—Vested Rights—Divorce—Judgment—Extraterritorial Jurisdiction.*—A child is not regarded as the property of the parent so as to give him a vested right in the child or its services under a decree of divorce, and the decree in this respect has no extraterritorial effect beyond the boundaries of the State where it was rendered. *In re Alderman*, 507.

PAROL EVIDENCE. See Evidence.

PARTIES. See Motions, 9.

1. *Evidence — Depositions — Nonresidents—Parties—Commencement of Action.*—The depositions of a party, objected to because the deponent was in the State when the action was begun, are competent when it appears that he was a resident of another State and not within this State at the time of the trial. Revisal, 1645 (9). *Jeffords v. Waterworks Co.*, 10.

2. *Appeal and Error—Failure to Docket—Motion to Dismiss—Practice.*—A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of Court to which the appeal is returnable, and before the case is docketed. Supreme Court Rule 17. *Mirror Co. v. Casualty Co.*, 28.

3. *Appeal and Error — Service of Case — Extension of Time—Agreement in Writing—Practice.*—When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. Supreme Court Rule 39. *Ibid.*

4. *Appeal and Error—Appeal Abandoned—Motion to Dismiss—Practice.*—When it appeared from the record on file in the Supreme Court that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed. *Ibid.*

5. *Parties — Contracts—Assignment—Persons Interested — Interpretation of Statutes.*—The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence

PARTIES—*Continued.*

that he has assigned the contract to a third person, not a party to the action, and has no further interest therein. Revisal, sec. 400. *Vaughan v. Moseley*, 156.

6. *Parties—Insurance—Indemnity.*—An ordinary indemnity contract against liability for injury to the employees of the insured, as the one sued on here, is not for the benefit of the employee, either in its express terms or in its underlying purpose, but for the indemnity and protection of the employer against unexpected and uncertain demands, and the rights arising under the contract are his property, and actions to recover same are under his control. *Clark v. Bonsal*, 270.

7. *Trespass—Torts—Parties—Owner—Injury to Wife—Recovery by Husband—Measure of Damages.*—The husband may recover in his own name in an action for damages done to his wife in consequence of an unlawful trespass of another for his separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife; and where the injuries are of a permanent nature a recovery by him may be had of such sum as will fairly compensate him for her future diminished capacity to labor, but excluding from the damages recoverable any mental suffering upon his part. *May v. Telegraph Co.*, 416.

8. *Consent Reference—Consent of Parties—Power of Courts—Jurisdiction.*—Neither party to a consent reference can withdraw therefrom, and it cannot be set aside except by mutual consent, or by the court, retaining jurisdiction, for good cause shown. *Lance v. Russell*, 448.

9. *Tenants in Common—Partition—Parties—Pleadings—Clerks of Court.*—In proceedings for partition of lands held in common, the petitioners are not entitled as matter of right to have a part only of the lands divided; and the defendants may, by answer, have included in the proceedings for a division such other lands as are held in common between the same parties. *Luther v. Luther*, 499.

10. *Same—Superior Court—Amendments.*—In proceedings for partition of lands held in common, it is proper for the petitioners to move before the clerk to strike from the defendant's answer allegations as to other lands not held in common by the same parties; but when on appeal, by order of court, the lands objected to are excluded from the proceedings, the judge can hear and determine all matters then embraced in the controversy, and proceed with the determination of the cause as amended. *Ibid.*

PARTIES—*Continued.*

11. *Tenants in Common—Parties—Husband and Wife—Survivorship.*—In proceedings in partition of lands by tenants in common, under allegations in the petition that "D. and I. are joint tenants, as between themselves, of an undivided one-half interest in the said lands," it appearing that they are husband and wife: *Held,* the allegations mean an estate held by entireties with the right of survivorship, and entitled them to only one share in the land, and thus both were parties in interest in the land to be partitioned. *Ibid.*

PARTITION. See Tenants in Common.

PAYMENT. See Principal and Agent, 8.

PENALTY STATUTES.

1. *Register of Deeds—Penalty Statutes—Interpretation—Marriage License—Reasonable Inquiry—Definition.*—The various sections of the Revisal relative to the issuance of a marriage license by the register of deeds, being sections 2083, 2088, 2090, especially the latter two, are construed as being *in pari materia,* and thus considered, the inquiry required to be made before issuing the license is such as to make it appear probable to a prudent person that there is no legal objection to the marriage. *Joyner v. Harris,* 295.

2. *Register of Deeds—Marriage License—Penalty Statutes—Reasonable Inquiry—Verdict, Directing—Questions of Law.*—Whether a register of deeds made reasonable inquiry, before issuing a marriage license, within the meaning of our statute, becomes a question of law, on admitted facts, and the court may instruct the jury to answer the issue according as it may decide the law upon the facts to be. Rules adopted by the courts for the purpose of determining whether such inquiry has been made by the register of deeds, discussed by MR. JUSTICE WALKER. *Ibid.*

3. *Same—Verdict, Directing—Evidence, How Considered.*—Upon issues submitted as to whether a register of deeds made reasonable inquiry before issuing a marriage license, the court's instruction, if the jury believe the evidence they should answer the first issue "Yes" and the second issue "No," and if they did not believe the evidence, to reverse their answers, with the burden of the issues upon the plaintiff, is equivalent to saying there was no evidence which, if believed, entitled the defendant to the verdict, and the evidence will be considered in the light most favorable to him. *Ibid.*

4. *Register of Deeds—Marriage License—Reasonable Inquiry—Insufficiency.*—It is not a reasonable inquiry by the register of

PENALTY STATUTES—*Continued.*

deeds as to the age of the prospective bride which will relieve him of the penalty of Revisal, sec. 2083, forbidding the issuing of a license for the marriage of a woman under 18 years of age without the consent of the person designated by the statute, for him to rely solely upon the answers of those whom he did not know, but merely trusted because of their manner and appearance, their information as to the age of the woman appearing to depend only upon what she had told them, and when by the exercise of reasonable care and diligence a means of obtaining reliable information could have been made available. *Cole v. Laws*, 104 N. C., 651; *Morrison v. Teague*, 143 N. C., 186, cited and applied. *Ibid.*

5. *Register of Deeds—Marriage License—Penalty Statutes—Age of Woman—Substantive Evidence.*—In an action against a register of deeds for the penalty prescribed by Revisal, sec. 2083, for issuing a license for the marriage of a woman under 18 years of age, without the consent of the person designated by the statute, it is held that the testimony of a witness as to the age of the woman depending solely upon her statements to him, which he repeated to the register when the license was applied for, is not substantive evidence of her age. *Ibid.*

PERMANENT DAMAGES. See Measure of Damages, 14.

PERSONALTY. See Estates, 3, 4; Evidence, 57, 60; Exemptions, 2; Trusts and Trustees, 4.

PHYSICAL SUFFERING. See Measure of Damages, 25.

PLEADINGS. See Divorce, 4, 5, 6, 7, 8, 9.

1. *Deeds and Conveyances—Warranty—Breach—Railroads—Easements—Notice—Pleadings—Demurrer.*—A purchaser of lands upon which the right of way of the North Carolina Railroad partially lies is fixed with notice of the easement, and is presumed to have taken it into consideration in the terms of purchase; therefore, when an action is based solely upon a covenant of warranty in a deed which does not exclude therefrom an easement of the said railroad company in the lands conveyed, this easement will not be construed as a breach of the warranty, and a demurrer to the complaint solely on that ground will be sustained. *Goodman v. Heilig*, 6.

2. *Pleadings—Contracts—Evidence.*—In an action brought upon contract, evidence relating to a second contract which was not pleaded is incompetent. *Jeffords v. Waterworks Co.*, 10.

PLEADINGS—*Continued.*

3. *Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.*—When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions. *Horton v. R. R.*, 146.

4. *Pleadings — Verification — Substantial Compliance.*—It is not necessary to the regularity of the verification of a complaint that it be subscribed by the party making it, and a substantial compliance is sufficient, and meets the requirements when it appears therefrom that the plaintiff swore to the complaint before an officer authorized to administer oaths. *Currie v. Mining Co.*, 209.

5. *Pleadings—Judgment by Default—Promise to Pay.*—When personal service on defendant has been properly made, a judgment by default for want of an answer may be obtained at the return term, if the complaint alleges an express promise to pay a certain sum due. *Ibid.*

6. *Pleadings — Definiteness — Judgment by Default.*—A pleader desiring a judgment by default final must set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation of his complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular. *Ibid.*

7. *Cities and Towns—Negligence—Statute of Limitations—Pleadings—Evidence.*—The statute of limitations of actions runs within three years next before the commencement of an action against a city for negligent or faulty construction or work done in changing the grade of a street to the damage of an abutting owner, and when this statute has properly been pleaded and established by the evidence, the cause of action is barred. *Earnhardt v. Commissioners*, 234.

8. *Insurance—Indemnity—Pleadings—Assignments—Insolvency.*—When the contract of indemnity is taken out by the insured and appears to be for his protection, it is treated and dealt with as an asset of the insured employer, and in the absence of an assignment from him or allegation of insolvency, etc., an employee has no interest therein upon which he may proceed directly against the insurer for damages for a personal injury received by him, which was covered by the policy. *Clark v. Bonsal*, 270.

PLEADINGS—*Continued.*

9. *Insurance—Pleadings—Demurrer.*—A complaint which joins an indemnity company as a party defendant in an action for personal injuries sustained, and which was covered in the policy contract, sets forth no cause of action against the indemnity company, which alleges a contract between the defendants for the protection of the employer alone, without allegation of an assignment to the suing employee or insolvency of the employer, and a demurrer on the ground of misjoinder of parties should be sustained as to the defendant indemnity company. *Ibid.*

10. *Courts—Jurisdiction—Pleadings—Judgment—Estoppel.*—When a court having jurisdiction of the cause and the parties renders judgment therein, it estops the parties and their privies as to all issuable matters contained in the pleadings, and though not issuable in a technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant and were in fact investigated and determined at the hearing. *Coltrane v. Laughlin*, 282.

11. *Sheriffs—Collection of Taxes—Balance Due—Counterclaim.*—In an action to recover from a sheriff a balance of taxes collected by him and due, a counterclaim or debt of any kind, however valid, cannot be sustained. *Graded School v. McDowell*, 316.

12. *County Commissioners—Sheriff's Commissions—Official Capacity—Counterclaim—Cross-actions—New Matter.*—A sheriff in his answer to an action by a graded school and the county commissioners for balance of taxes collected by him, due and not paid over, may not set up a counterclaim for commissions on taxes for previous years collected by one wrongfully appointed for the purpose by the county commissioners, for this is a cross-action against the plaintiffs for their alleged wrongful act as county commissioners in their official capacity, which he could not maintain if brought directly. *Ibid.*

13. *Trespass — Interpretation of Statutes — Damages — Special Pleas.*—It is not necessary to specially plead the Laws of 1907, ch. 320, or refer to it in the complaint, when the act of the trespass and unlawful cutting of timber entitles the one upon whose lands the trespass is committed in the counties therein named to recover double the amount of the damages proved. *Lumber Co. v. Hayes*, 333.

14. *Pleadings — Lands — Lis Pendens.*— In an action to recover lands, the filing of the complaint, in which the property is

PLEADINGS—*Continued.*

described and the purpose of the action stated, operates as a *lis pendens. Simmons v. Fleming*, 389.

15. *Same—Deeds and Conveyances—Registration—Notice.*—When a complaint in an action to recover lands operates as a *lis pendens*, evidence as to the date of a deed to a purchaser thereof for value subsequently registered becomes immaterial, as the deed becomes effective from the date of its registration and the vendee is a purchaser with notice. *Ibid.*

16. *Issues—Pleadings—Appeal and Error.*—When the issues submitted arise from the pleadings and present all the contentions of the parties it will not be held as reversible error on appeal for the court to refuse to submit other issues. *Arthur v. Henry*, 393.

17. *Pleadings — Allegations — Cause of Action — Interpretation — Trusts and Trustees — Lands — Accounting—Possession.*—In an action for damages arising from a breach of trust of defendant in conveying at an inadequate price certain lands conveyed by the plaintiff to him, by deed absolute upon its face, but, in accordance with a contemporaneous unregistered agreement, to be held in trust by the defendant and sold at a fair price to pay a debt the plaintiff owed him, and the surplus to the defendant: *Held*, an allegation by plaintiff in his complaint, in substance, that he was resisting an action for possession by defendant's vendee, not sufficient to justify a dismissal of the action. *Lance v. Russell*, 448.

18. *Damages — Release — Mental Incapacity—Pleadings—Sanity—Evidence—Estoppel.*—In an action for damages for a personal injury alleged to have been caused by the negligence of the defendant, the plaintiff sought to set aside a release from further liability, on the ground of his mental incapacity, caused by the injury, at the time of executing the release: *Held*, it was unnecessary for plaintiff to allege and prove sanity since that time to maintain his action, and the doctrine of estoppel would rather apply to defendant, who alleged his sanity at the time of the release. *Brazille v. Barytes Co.*, 454.

19. *Exemptions—Debtor and Creditor—Fraud—Appeal and Error — Pleadings—Reformation—Issues—Procedure.*—It appearing in this suit that the creditors of an insolvent defendant are entitled to have improvements put upon his wife's land with his funds subjected to the payment of their debts, from which the debtor may claim his personal property exemption were the pleadings properly drawn to present the issue, the case is remanded with direction to reform the pleadings in

PLEADINGS—*Continued.*

accordance with the principles declared, and to submit issues for the purpose of ascertaining the amount invested by the husband for his wife in the improvement, less the personal property exemption therein, and, also, the amount by which the property has been enhanced in value by reason of the improvement, with such other issues as may be necessary. *Michael v. Moore*, 462.

20. *Executors and Administrators—Final Account—Personal Liability—Answer—Nature of Action.*—When in answer to a petition by an administrator for an account and settlement, the heirs and distributees seek to charge the administrator personally with debts he has charged against the estate, the action becomes one personally against the administrator, and as to such things he is not entitled to an attorney's fee for professional legal services rendered therein. *Overman v. Lanier*, 544.

21. *Same—Partial Recovery—Costs—Statement—Reformation—Interest.*—In this action, in the nature of one to personally charge the administrator with certain debts of the estate, there was final recovery of about $6,000 in excess of the sum the administrator admitted to be due; and all costs should be taxed against him but for the fact that the heirs and distributees unsuccessfully sought to recover further and larger sums; it is adjudged that the cost of the litigation be divided between the parties and that the account of the administrator be reformed, and that interest be charged on the correct amount due by him from the date of his filing his report. *Ibid.*

22. *Pleadings — Counterclaim — Principal and Agent—Contract—Subject-matter.*—In an action relating to dealings between a principal and his sales agent, a counterclaim is properly set up when its subject-matter grew out of and related to the dealings between the parties or the contract of employment. *Church v. Dawson*, 566.

23. *Pleadings—Contributory Negligence—Unsafe Conditions—Appliances—Defense—Instructions.*—The defendant being sued by its engineer for damages alleged to have been inflicted on him in a derailment upon an unsafe track and by the use of unsafe appliances, alleged only in its answer, by way of defense, that the plaintiff's injury was caused by his negligently operating or running the train: *Held*, as there was no evidence of negligence as alleged, the defendant's prayers for instruction upon contributory negligence were properly refused. *Worley v. Logging Co.*, 490.

PLEADINGS—*Continued.*

24. *Tenants in Common—Partition—Parties—Pleadings—Clerks of Court.*—In proceedings for partition of lands held in common, the petitioners are not entitled as matter of right to have a part only of the lands divided; and the defendants may, by answer, have included in the proceedings for a division such other lands as are held in common between the same parties. *Luther v. Luther*, 499.

25. *Same—Superior Court—Amendments.*—In proceedings for partition of lands held in common, it is proper for the petitioners to move before the clerk to strike from the defendant's answer allegations as to other lands not held in common by the same parties; but when on appeal, by order of court, the lands objected to are excluded from the proceedings, the judge can hear and determine all matters then embraced in the controversy, and proceed with the determination of the cause as amended. *Ibid.*

POLICE POWERS. See Statutes, 11, 12; Cities and Towns, 19, 20.

POLICY, INTERPRETATION OF. See Insurance, 14, 15.

POLLUTION OF STREAMS. See Water and Water-courses, 1, 2.

POSSESSION. See Pleadings, 17; Evidence, 31, 88.

POWER OF COURT. See Courts.

PRACTICE.

1. *Evidence—Depositions—Motion to Quash—Objections and Exceptions—Practice.*—A deposition can be quashed only for irregularities in the taking or the incompetency of the witness, and exception should be taken to the questions and answers of the deponent and not by motion to quash the depositions. *Jeffords v. Waterworks Co.*, 10.

2. *Evidence—Depositions—Commission—Name of Witness—Practice.*—It is not necessary that the commission issued for taking depositions named the particular witness to whose depositions exception is taken, when the notice to take the deposition gave the name of the witness and the address of the commissioner, and the requirement of the statute has been met. Revisal, 1652. *Ibid.*

3. *Evidence—Objections and Exceptions—Appeal and Error—Harmless Error.*—Over defendant's objection, plaintiff was permitted to ask the witness of the former if he had not sold his land to the defendant at a big price: *Held*, if on the facts the answer had a reasonable and natural tendency to

PRACTICE—*Continued.*

create a bias in defendant's favor it was relevant; and if otherwise, it would be harmless and not reversible error. *Curry v. Fleer*, 16.

4. *Railroads — Negligence — Relief Department — Acceptance of Benefits—Equity—Credits on Judgment—Procedure.*—As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered. *Wacksmuth v. R. R.*, 34.

5. *Instructions, More Explicit — Special Requests — Practice.*—When the judge properly instructs the jury generally upon the law applicable to the issues, an exception that the charge was not full or explicit will not be considered on appeal, as, in such a case, error can only be assigned to the refusal of the judge to give proper and more explicit instructions in response to special prayers therefor. *Trollinger v. Fleer*, 81.

6. *Appeal and Error—Account—Reference—Slander—Damages—Appeal Premature—Practice.*—In an action against a bank, alleging certain errors in the accounts of the bank with the plaintiff and asking correction thereof, and seeking damages for slander, injury to credit, and the wrongful protesting of plaintiff's checks, an order of reference was made as to the matter of account, expressly reserving for trial the issues in the pleadings as to slander, etc.: *Held*, an appeal from the judgment upon exceptions to the referee's report, before the trial upon the issues reserved, is premature, and will be dismissed without prejudice. *Beck v. Bank*, 105.

7. *Courts, Justices'—Appeal—Time of Docketing—Procedure.*—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the Superior Court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. Revisal, sec. 608. *Peltz v. Bailey*, 166.

8. *Same—Recordari—Laches—Attorney and Client.*—When an appeal from a justice's court has not been docketed within the time prescribed by the statute (Revisal, sec. 608), the appellant should move for a *recordari*, at the first ensuing term of the Superior Court, that the appeal should be docketed; and though appeal has been prayed in open court and the fee of the justice paid, the failure to move for a *recordari*

PRACTICE—*Continued.*

and to make proper inquiry of the clerk of the Superior Court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. *Ibid.*

9. *Process, Returnable—Nonresidents—Publication—Procedure.*—It is not required as to the validity of the service of a summons by publication and attachment on property within the State that the action be commenced within thirty days from the time of issuing the summons, or that service be completed ten days before the return term. *Currie v. Mining Co.*, 209.

10. *Tenants in Common—Plea—Sole Seizin—Jurisdiction—Ejectment—Procedure.*—In proceedings by tenants in common for partition of lands, a plea of sole seizin by one of them may be entered before the clerk, and on transfer to the court in term, the issue will be determined as in an action of ejectment. *Coltrane v. Laughlin*, 282.

11. *Sheriffs — Taxes — Mandamus—Procedure.*—A graded school and county commissioners sued the sheriff for taxes collected which should have been paid the school, and the defendant set up a counterclaim that for certain previous years the county commissioners had wrongfully appointed another to collect these taxes, and that the commissions thus due him should be deducted from plaintiff's claim: *Held*, (1) the sheriff's remedy was by mandamus against the county commissioners at the time alleged, to have the tax books placed in his hands by the county commissioners, and an injunction to prevent the payment of the commissions to the collector alleged wrongfully to have been appointed, until his right had been decided; (2) or by suit against the collector alleged to have been wrongfully appointed, for the commissions paid to him. *Graded School v. McDowell*, 316.

12. *Sheriffs—Commissions on Taxes—Speedy Trial—Procedure.*—The right to a speedy trial by a sheriff suing for commissions on taxes collected by one wrongfully appointed by the board of county commissioners is secured under Revisal, 833; and his interests are protected by the undertaking required by Revisal, 835. *Ibid.*

13. *Same—Trusts and Trustees—Bar to Action.*—The taxpayers are not required to pay commissions twice for the collection of taxes because the wrong party discharges the duties of collector, the remedy of the one wrongfully deprived being

PRACTICE—*Continued.*

against the intruder who has thus deprived him of his commissions, in an action for money had and received to his use (Revisal, 844), and his failure to do so in his action to recover the office is a bar to an independent action therefor. *Ibid.*

14. *Verdict—Judgment—Extent of Error Ascertained—Supreme Court—Procedure.*—Where under an erroneous instruction the jury has awarded double the amount of the damages actually sustained by the plaintiff in an action of trespass and unlawful cutting of timber trees in the counties specified in the Laws of 1907, ch. 320, and it can readily be ascertained from the verdict what sum is properly recoverable, the correction will be made in the Supreme Court without granting a new trial. *Lumber Co. v. Hayes*, 333.

15. *Appeal and Error—Second Appeal—Motion to Rehear—Procedure.*—A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being in the Supreme Court by a motion to rehear. *Hospital v. R. R.*, 460.

16. *Reference—Trial by Jury—Exceptions—Issues Tendered—Procedure.*—A party to a compulsory reference should not only have proper exceptions entered, but tender the issues arising from the evidence and attach them to his exception to the referee's report when he desires to preserve his right to a trial by jury thereon. *Church v. Dawson*, 566.

17. *Judicial Sales—Trustees—Order of Court—Disbursements in Excess.*—A trustee appointed by the court in judicial proceedings to hold and disburse moneys arising from the sale of lands is not entitled to a credit of a larger amount paid to certain parties in interest than ascertained and fixed by an order in the case made by the court, as a payment in excess of that sum is made without authority. *Henry v. Hilliard*, 572.

18. *Instructions, Confusing—Contributory Negligence—Technical Correctness—Explanation—Practice.*—An instruction, in this case, *Held*, technically correct, but tending to confuse and mislead juries, that if the jury "find from the evidence that plaintiff was guilty of negligence which contributed proximately to the injury, even in the smallest degree, you will answer" affirmatively the issue as to contributory negligence; and it is the better practice for the trial judge to adhere to the practice which requires them to explain the conduct of the plaintiff which will amount to negligence,

PRACTICE—*Continued.*

and instruct them that if there is negligence which is the real cause of the injury, he cannot recover. *Worley v. Logging Co.*, 490.

19. *Appeal and Error — Objections and Exceptions — Evidence— Practice.*—Exceptions to evidence objected to must be taken in order to make the matter available on appeal. *Ibid.*

20. *Appeal and Error—Objections and Exceptions—Instructions— Practice.*—Exceptions to the charge may be taken for the first time when the case on appeal is settled, and they should point out the parts of the charge to which exceptions are taken. *Ibid.*

21. *Judgment — Motion in Arrest—Conviction—Indictment—Allegations—Term of Court—Procedure.*—Omitting to state the term of the court in which a true bill is found is not a sufficient ground upon which to sustain a motion in arrest of judgment; especially so when from the record it appears at what term the bill was returned. *S. v. Francis*, 612.

22. *Streams — Water Supply — Pollution — Conviction—Motion in Arrest—Bill of Particulars—Procedure.*—Upon a charge and conviction for polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), a motion made in arrest of judgment upon the ground that it was not made to appear which stream the prisoner was charged with polluting, will not be sustained, the proper procedure being upon motion for a bill of particulars (Revisal, sec. 3244). *S. v. Corbin*, 619.

23. *Written Admissions—Detached Portions—Severable Matters— Rebuttal — Practice.*—When an admission appearing in a writing is put in evidence, the whole instrument, or so much of it as relates to the matter embraced in the admission, must be received, subject to the qualification that a party may always offer a distinct and severable portion of a writing containing declarations or admissions of his adversary, which tends to establish his position, leaving to that other the right to put such remaining portions in evidence as may serve to explain or qualify the admission. *S. v. Corpening*, 621.

PRECINCTS. See Municipal Corporations.

PREMEDITATION. See Homicide.

PREMIUMS. See Evidence, 30, 31.

PRESUMPTIONS. See Railroads, 21, 24, 25; Wills, 13; Appeal and Error, 20; Instructions, 12.

1. *Appeal and Error — Instructions — Presumptions.*—When the charge of the trial court is not set out in the record on appeal it is assumed that he fully explained to the jury the significance of an issue submitted and the bearing of the evidence thereon. *Wacksmuth v. R. R.*, 34.

2. *Carriers of Goods—Live-stock Bills of Lading—Void Stipulations—Lex Loci Contractus—Presumptions.*—The decisions in this State declaring void, under certain conditions, a stipulation in the live-stock bill of lading of a railroad as a contract against recovery for its negligent acts, are based upon the principles and policy of the common law, and where the contract of carriage is made in another State, these same principles are presumed as to the law of such other State, in the absence of evidence to the contrary. *Harden v. R. R.*, 238.

3. *Railroads—Negligence—Derailment—Unsafe Road—Appliances —Presumptions—Verdict, Directing.*—When the evidence is not conflicting and tends to show that the plaintiff was injured while operating defendant's train, by a derailment upon an unsafe roadbed, with unusually dangerous grades and curves, and that the equipment used was defective, the trial judge may properly direct the jury to answer the issue as to negligence in the affirmative if they found the facts to be as testified. *Worley v. Logging Co.*, 490.

4. *Murder—Deadly Weapon—Second Degree—Presumptions—Instructions.*—The killing of a human being with a deadly weapon raises the presumption of murder in the second degree, and a request for instruction which assumes a less offense, under conflicting evidence, should be refused. *S. v. Grainger*, 628.

PRINCIPAL AND AGENT. See Master and Servant, 21; Statute of Frauds; Attorney and Client, 3, 4.

1. *Contracts—Principal and Agent — Confirmation — Subsequent Ratification—Authority, Express or Implied.*—When one person holds another out as his agent and thereby induces others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so; or, if he ratifies what he did, it is the same, in effect, as if he had in the beginning actually and expressly conferred the requisite authority. *Trollinger v. Fleer*, 81.

2. *Same—General Charge—Evidence—Questions for Jury.*—The defendant, having made by letter a definite proposition to the

PRINCIPAL AND AGENT—*Continued.*

plaintiff to work on his farm, requested an acceptance of the proposition by telegram, with which the plaintiff complied. The plaintiff then went to the defendant's farm, and his employment was accepted in accordance with the terms of the proposition by one who was in possession, assuming full control and management for the defendant; and there was evidence of ratification by the defendant at a subsequent time when he visited his farm: *Held*, (1) the question of plaintiff's employment under the contract did not depend solely upon whether the defendant received the telegraphic reply to his written proposition, but also upon whether it was consummated by the acts of the defendant's agent; (2) the recognition by the defendant of this agency, with full knowledge of the facts, was a ratification of the agent's prior acts, and his assent to what the agent had done was equivalent to prior authority given; (3) evidence that the defendant placed the agent in general charge of his farm, with apparent right to make contracts of employment, is competent to be considered by the jury upon the question whether an agency of the character claimed existed or not. *Ibid.*

3. *Principal and Agent—Corporations—Officers—Fraud—Corporate Acts—Evidence.*—A corporation dealing in stocks is fixed with notice of a fraudulent transaction induced by its president, secretary, treasurer, and owner of nearly its whole stock, in which a large profit in the sale of the stock has been realized in the usual business channels of the company, the stock sold having been listed with the corporation for sale; and the transaction complained of will be deemed, in the absence of evidence to the contrary, to have been done in behalf of the corporation and not of the officer who consummated it in his individual capacity. *Brite v. Penny*, 110.

4. *Corporations, Insolvent—Factors—Contracts—Consideration—Preferred Stock—Debtor and Creditor — Distribution.*—An agreement entered into by a manufacturing corporation and a factor provided that the latter should take a certain amount of preferred stock in the former, and so long as he held the stock he should sell at a certain commission the product of the corporation, the stock to be taken up by the corporation if the account was changed. By mutual consent this agreement was transferred by the factor to the plaintiff along with the preferred stock, and the corporation having become insolvent, the plaintiff seeks as a creditor a priority of payment of his stock to the other preferred stock issued by the corporation, there being insufficient funds after the

PRINCIPAL AND AGENT—*Continued.*

payment of debts to pay this stock in full: *Held*, (1) the contract did not contemplate the insolvency of the corporation, and hence the question as to whether the corporation could thus retire its stock did not arise; (2) the plaintiff was not to be regarded as a creditor. He was entitled only to his pro rata part in the distribution of the funds with the other holders of the preferred stock. *Farrish v. Cotton Mills*. 188.

5. *Principal and Agent—Fraud—Misappropriation of Funds—Cash Transactions—Evidence—Directing Verdict.*—Upon an issue in an action brought by the principal against his agent for embezzlement, or wrongful conversion and fraudulent misapplication of the proceeds from the sale of the plaintiff's stock, it is proper for the trial judge to direct a verdict in defendant's favor where all the evidence, both of plaintiff and defendants, tends to show that the defendants, though instructed to sell for cash, could not do so, and sold the stock for stock in another corporation in part and accepted for the balance cash orders on the corporation issuing the stock, this being deemed by them best for the interest of the principal under the circumstances, and they having received no benefit from the transaction. *Osborne v. Durham*, 262.

6. *Same—Worthless Stock—Measure of Damages.*—An agent acting for the interest of his principal in the sale of stock in a corporation which turned out to be insolvent, in violation of an understanding between them that the sale was to be for cash, is not liable to the principal for the cash he was instructed to receive therefor when it appears that the stock could not be sold for cash, and that, acting for the principal as he deemed for his best interest under the circumstances, he took in payment for the stock a promissory note for the face value of the stock, which, without the agent's fault, proved to be worthless, the damages recoverable, at most, being confined to the value of the stock the agent was instructed to sell, which in this case turned out to be valueless. *Ibid.*

7. *Same—Notice—Waiver.*—An owner of stock in a corporation, which subsequently proved to be valueless, requested D, the secretary of the corporation, and W, who had charge of the certificates, to sell it for him, which they undertook to do, with the understanding that the transaction was to be for cash. It proved that cash could not be obtained, and acting for the best interests of the principal, the agents negotiated a sale, which resulted in D giving his note for the full face

PRINCIPAL AND AGENT—*Continued.*

value of the stock and taking a transfer of the certificates to himself, upon which the plaintiff still owed a large balance. The note thus taken was sent to the principal, who, after the corporation had gone into a receiver's hands, instructed the agent to prove his claim against it, which he did. Thereafter he instituted this action upon the note, after the maker had become insolvent, against him and the other agent, alleging, as to both, excess of authority and a fraudulent misappropriation of funds, etc.: *Held*, the plaintiff could only recover upon the note, as it appeared that he was benefited by transaction, being released from his stock subscription, and the circumstances were such as to put a prudent man upon notice that the stock had not been sold for cash, and further, that his subsequent conduct was a ratification of the act of his agents, which released them from liability. *Ibid.*

8. *Banks—Collection—Disputed Amount—Tender as Full Payment—Retention of Payment—Knowledge—Principal and Agent—Ratification.*—The plaintiff bank sent to its correspondent a note of defendant for collection, which was protested and returned, and subsequently sent again for collection, when defendant tendered a smaller amount in full settlement, contending that this less sum was that actually owed, on account of payments that had not been credited, which the collecting bank received and agreed to forward to the plaintiff with a letter of explanation, for its acceptance or rejection. The plaintiff made no reply to this communication, and did not return or offer to return the sum received through its correspondent, and brings its action for the full recovery of the note, claiming the amount received therefrom as a credit thereon: *Held*, (1) by accepting the payment through its banking connection under the condition that it was to be in full settlement bars the plaintiff of further recovery; (2) the position that plaintiff was not aware of the positive conditions of the tender made by defendant to its bank of collection cannot avail plaintiff when, subsequently aware thereof, it insists on retaining the payment thus made, as such an act amounts to a ratification of its agent's act. *Bank v. Justice*, 373.

9. *Pleadings — Counterclaim — Principal and Agent—Contract—Subject-matter.*—In an action relating to dealings between a principal and his sales agent, a counterclaim is properly set up when its subject-matter grew out of and related to the dealings between the parties or the contract of employment. *Church v. Dawson*, 566.

PRINCIPAL AND AGENT—*Continued.*

10. *Negligence—Principal and Agent—Disobedience to Orders—Further Orders — Vice-principal — Evidence—Instructions.*—When in an action for damages to an engineer operating defendant's train run by steam power, there is evidence tending to show that the injury complained of was caused by a derailment upon an unsafe roadway, and that in the train was a very unsafe car which the superintendent of the defendant company told the plaintiff not to take upon his train again, with further evidence that the car was thereafter loaded with lumber and the plaintiff instructed by another vice-principal of the defendant to take it with him on the occasion of the injury: *Held*, there being no evidence on defendant's part tending to show that its employee who instructed the plaintiff to take the loaded car on the train was not a vice-principal of defendant of equal dignity of the superintendent, it could not avail itself of an instruction precluding recovery if the jury found that the injury would not have occurred had plaintiff obeyed the order of the superintendent not to take the car out again. *Worley v. Logging Co.*, 490.

PRINCIPAL AND SURETY.

1. *Principal and Surety—Attorney at Law—Collection of Debt—Extension of Time—Authority Implied.*—An attorney employed simply to collect a note has no authority to extend the time for its payment so as to release the other parties bound thereon, or to do any act which will jeopardize his client's interest. An attorney can only collect in cash, and, without express authority or conduct equivalent to authority, cannot temporize with the debtor to the prejudice of the creditor. *Hall v. Presnell*, 290.

2. *Same.*—An accommodation paper with sureties was deposited by the payee with a bank as collateral to a note given the bank for a loan to him. At the request of one of the sureties, the maker of the collateral note gave a chattel mortgage to the payee thereof to secure the debt and indemnify the sureties, which was duly registered. The bank sent the note made to it, with the collateral, to an attorney for collection, who allowed the maker of the collateral note several days in which to sell the mortgaged chattels and pay the note, but subsequently sold them under the mortgage and applied the proceeds to the payment of the note, which proved to be insufficient for the purpose: *Held*, the act of the attorney in granting the maker of the collateral note time in which to sell the mortgaged chattels and pay the note did not operate as a discharge of any of the parties. *Ibid.*

PRIVITY. See Contracts, 6.

PROCEDURE. See Pleadings, 19; Practice; Motions, 7; Process, 2.

PROCESS.

1. *Process — Service—Nonresidents—Publication—Statutes—Constitutional Law.*—Revisal, sec. 1243, providing for personal service of summons on corporations "having property or doing business in this State," by leaving a true copy of the summons with the Secretary of State, is constitutional and valid. *Currie v. Mining Co.*, 209.

2. *Process, Returnable—Nonresidents—Publication—Procedure.*—It is not required as to the validity of the service of a summons by publication and attachment on property within the State that the action be commenced within thirty days from the time of issuing the summons, or that service be completed ten days before the return term. *Ibid.*

3. *Process—Service by Publication—Personalty—Nonresidents—Interpretation of Statutes.*—When there is service by publication on two nonresident defendants, one of whom has lands in the State subject to attachment, and owes the other defendant a part of its purchase price, the debt owed is not such an interest in the property as comes within the meaning of Revisal, sec. 1243, providing for service of summons by publication, as it is personalty in the hands of the creditor beyond the borders of the State. *Ibid.*

4. *Nonresidents — Process — Service by Publication — Personal Judgment—Proceedings in Rem.*—A judgment against a nonresident defendant by publication of service is invalid when he has no property in the State subject to attachment; and if he has such property, which has properly been attached, no personal judgment may be rendered against him in the absence of personal service, the proceedings being *in rem*, leaving the judgment to be satisfied only to the extent of the proceeds of sale of the property attached. *Ibid.*

5. *Process — Publication — Attachment—Property—Debt—Status.* A judgment by default final against two nonresident defendants, A and G, will be set aside for irregularity when it appears from the complaint that A had no property within the State, and the ground of relief is based upon an alleged assignment by A to the plaintiff of a debt for the purchase money of lands situated here, against which an attachment has been sued out, without allegation that G knew of its assignment, or of the status of the debt owed by A or of what disposition had been made of it, the liability of G

PROCESS—*Continued.*

being determined as of the time of the levy of the attachment, and the allegations therefore not being sufficiently definite. *Ibid.*

PROOF. See Burden of Proof; Evidence.

PROXIMATE CAUSE. See Negligence, 41, 48; Contributory Negligence, 10.

PUBLICATION. See Process, 2, 4, 5.

PUBLIC HIGHWAYS. See Highways.

PUBLIC POLICY. See Interpretation of Statutes, 2; Carriers of Goods, 8, 9, 10.

PUNISHMENT. See Indictments, 3.

PUNITIVE DAMAGES. See Measure of Damages, 1, 2, 3, 7, 24.

PURCHASERS. See Deeds and Conveyances.

QUASI-CORPORATION. See Municipal Corporation.

QUESTIONS FOR JURY. See Evidence; Burden of Proof, 1.

1. *Evidence — Lands — Acts of Ownership — Age of Witness — Weight of Evidence—Questions for Jury.*—When a witness, testifying as to acts of ownership of one having claimed the title to lands in dispute, says that at the time he was five or six years old, the weight of his testimony is for the jury to determine. *Maynard v. Sears*, 1.

2. *Nonsuit—Evidence—Questions for Jury.*—In this case there was sufficient evidence to be submitted to the jury upon the question as to whether the plaintiffs were the heirs at law of J. S., under whom they claimed certain lands, the title to which was in dispute, and therefore a motion to nonsuit upon the evidence on that ground was improperly sustained. *Ibid.*

3. *Evidence—Hypothetical Questions—Sufficiency of Testimony—Questions of Law—Questions for Jury.*—It is competent for a judge to decide whether there was any evidence of the facts assumed to exist in asking a hypothetical question of an expert, and then leave it to the jury to say whether the facts had been established by the proof, and instruct them, if they had not been, to disregard the answers. *Bailey v. Winston*, 252.

QUESTIONS OF LAW. See Negligence, 24.

1. *Evidence—Hypothetical Questions—Sufficiency of Testimony—Questions of Law—Questions for Jury.*—It is competent for

QUESTIONS OF LAW—*Continued.*

a judge to decide whether there was any evidence of the facts assumed to exist in asking a hypothetical question of an expert and then leave it to the jury to say whether the facts had been established by the proof, and instruct them, if they had not been, to disregard the answers. *Bailey v. Winston*, 252.

2. *Register of Deeds—Marriage License—Penalty Statutes—Reasonable Inquiry—Verdict, Directing—Questions of Law.*—Whether a register of deeds made reasonable inquiry, before issuing a marriage license, within the meaning of our statute, becomes a question of law, on admitted facts, and the court may instruct the jury to answer the issue according as it may decide the law upon the facts to be. Rules adopted by the courts for the purpose of determining whether such inquiry has been made by the register of deeds, discussed by MR. JUSTICE WALKER. *Joyner v. Harris*, 295.

3. *Same—Verdict, Directing—Evidence, How Considered.*—Upon issues submitted as to whether a register of deeds made reasonable inquiry before issuing a marriage license, the court's instruction, if the jury believe the evidence they should answer the first issue "Yes" and the second issue "No," and if they did not believe the evidence, to reverse their answers, with the burden of the issues upon the plaintiff, is equivalent to saying there was no evidence which, if believed, entitled the defendant to the verdict, and the evidence will be considered in the light most favorable to him. *Ibid.*

RAILROADS.

1. *North Carolina Railroad—Location—Judicial Notice—Rights of Way—Powers.*—The courts will take judicial notice of the fact that the North Carolina Railroad is a great public highway, running from Goldsboro to Charlotte through Rowan County; that it belongs to a *quasi*-public corporation chartered in 1849 by an act of the General Assembly, having full power of eminent domain, with provision that where land is not condemned for a right of way within a certain time, the corporation acquires a right of way 100 feet on each side the center of the track. *Goodman v. Heilig*, 6.

2. *Railroads—Easement—Fee—Reverter.*—A railroad corporation does not acquire the fee simple to the land covered by its right of way, but only an easement therein, which would revert to the owner of the fee relieved of the burden of the easement should the railroad be discontinued. *Ibid.*

3. *Deeds and Conveyances—Warranty—Breach—Railroads—Easements—Notice—Pleadings—Demurrer.*—A purchaser of lands

RAILROADS—*Continued.*

upon which the right of way of the North Carolina Railroad partially lies is fixed with notice of the easement, and is presumed to have taken it into consideration in the terms of purchase; therefore, when an action is based solely upon a covenant of warranty in a deed which does not exclude therefrom an easement of the said railroad company in the lands conveyed, this easement will not be construed as a breach of the warranty, and a demurrer to the complaint solely on that ground will be sustained. *Ibid.*

4. *Railroads — Negligence — Relief Department — Acceptance of Benefits — Written Contract — Parol Evidence.* — The word "benefits" as ordinarily used in the regulations of a railroad company's relief department does not include hospital treatment and medical attention; and as it is the acceptance by a member of that department of the benefits thereunder which may, in proper cases, bar his recovery for damages for a personal injury negligently inflicted by the company, and as the act of acceptance, when in dispute, is not included in any part of the written contract embraced in the regulations, it may be shown or disproved by parol evidence of the circumstances connected with it. *Wacksmuth v. R. R.*, 34.

5. *Railroads—Negligence—Relief Department—Acceptance of Benefits—Contracts—Evidence.*—When in defense to an action for damages for personal injuries inflicted upon an employee, a railroad company relies upon the acceptance of benefits by the employee as a member of its relief department as a bar under the rules and regulations of the department, it is competent for the plaintiff, as tending to avoid the bar, to show that he had accepted the benefits under the assurance of the defendant that it would do certain things in regard to keeping him as an employee, etc., which it had failed to do, and that, relying on this promise, he had accepted the benefits; and evidence in this case *Held* sufficient to sustain a verdict in plaintiff's favor on the issue as to whether the plaintiff, after his injury, voluntarily accepted the benefits under his contract. *Ibid.*

6. *Railroads—Negligence—Relief Department—Acceptance of Benefits — Promise — Contracts — Burden of Proof—Evidence—Questions for Jury.*—It is a voluntary acceptance by an employee, a member of a railroad company's relief department, of the benefits of that department, after an injury has been inflicted, that bars his right to recover damages from the company; and when the defense in the action is that the plaintiff had promised to accept the benefits, it is necessary

RAILROADS—*Continued.*

for the defendant to show an acceptance of the promise and its performance thereof in order to render the defense available. *King v. R. R., post,* 44, cited as controlling. *Ibid.*

7. *Railroads—Negligence—Relief Department—Acceptance of Benefits — Equity — Credits on Judgment — Procedure.*—As the plaintiff in this case has accepted the benefits of the defendant's relief department, and under the circumstances is permitted to recover, he should return the amount so received, as he properly offered to do, and it is ordered that the amount he has received be credited to the defendant company upon the judgment rendered. *Ibid.*

8. *Railroads—Relief Department—Benefits Accepted—Consideration—Burden of Proof.*—When a railroad company sets up as a defense to an action for personal injury that the plaintiff was a member of its relief department and was concluded under the rules and regulations of that department, by accepting benefits from bringing his action, whether a release, accord and satisfaction, or by whatever name called, and it appears that the defendant had full control of the department, with the power to make or alter the rules and regulations at will and to fix the membership fees, the burden is upon the defendant, relying upon the binding effect of the rules and regulations as a contract, to show that on its part it has paid a valuable consideration by introducing evidence of what it has paid or done for the support of the department, and it must be made to appear that the consideration was not so small that a person of ordinary discernment and judgment would consider that the defendant had paid nothing. *King v. R. R.*, 44.

9. *Same—Guarantee.*—For a railroad company to avail itself of the defense that the plaintiff was a member of its relief department and accepted benefits thereunder, and could not recover damages for defendant's negligence in injuring him, under the rules and regulations of the department, a valuable consideration must be shown, and the mere fact that the defendant had guaranteed by contract to pay all the operating expenses of the department and to provide it with necessary facilities is not of itself sufficient evidence thereof, the rules and regulations being formulated by defendant and under its control. *Ibid.*

10. *Railroads—Relief Department—Members—Privity of Contract.* There is privity of contract between a railroad company having a relief department for which it furnishes facilities and operating expenses and an employee, a paying member of

RAILROADS—*Continued.*

that department, and a contract may be sustained, upon a valuable consideration shown, that the employee, in proper instances, may not receive the benefits of the department and then sue for damages for a personal injury alleged to have been received owing to the defendant's negligence. *Ibid.*

11. *Railroads — Relief Department — Benefits—Voluntary Acceptance—Public Policy—Interpretation of Statutes.*—A contract between a railroad company and its employee giving the latter the choice, after the injury has been received, of maintaining his action for damages for personal injuries inflicted by the former or relinquishing his right of action by voluntarily accepting the benefits of the relief department, if he is a member, is not against public policy or in contravention of the statutes invalidating agreements between employer and employee which exempt the employer from its liability for negligence. *Ibid.*

12. *Railroads — Relief Department—Benefits—Voluntary Acceptance—Fraud and Undue Influence—Surrounding Conditions—Master and Servant.*—A voluntary acceptance by an employee of a railroad company of the benefits of the latter's relief department so as to release his cause of action for damages arising from the negligence of the company, must be free from fraud and undue influence, by which is meant a controlling influence, impelling him to act as otherwise he would not do, and there may be considered as relevant circumstances the facts that the department was under the control of the master, that the employee might be influenced under this relationship, the absence or presence of the employee's friends or relations, and the presence of employees of the company likely to influence his choice, the physical or mental condition induced by the injury existing at the time of choosing, the general advantage the department holds out for those who are members, and the benefit to the company in causing its employee to determine whether he will sue or accept the benefits under the department. *Ibid.*

13. *Railroads—Relief Department—Member — Voluntary Acceptance—Knowledge—Opportunity—Fraud.*—An employee of a railroad company is required to exercise diligence in protecting his rights in choosing whether he will sue the railroad company for damages for a personal injury sustained or accept the benefits of the relief department, of which he was a member, and he will not be excused on the ground of want of knowledge, where he has had the opportunity to inform himself. *Ibid.*

RAILROADS—*Continued.*

14. *Railroads—Relief Department—Corporations—Ultra Vires.*—It is not *ultra vires* for a railroad to establish a relief department for the benefit of employees who are members of it, in case of sickness and accident, charging the members a fee and contributing to its support and efficiency. *Ibid.*

15. *Railroads — Relief Department — Benefits Received—Personal Injuries — Negligence — Judgment—Credits.*—When an employee of a railroad company has accepted benefits from its relief department under conditions permitting recovery for personal injuries negligently inflicted on him, the amount of the benefits received should be credited on the judgment. *Ibid.*

16. *Railroads—Interstate Commerce—Master and Servant—Intrastate Cars—Federal Employer's Liability Act.*—A locomotive engineer on a train which carries interstate cars is engaged in interstate commerce within the meaning of the Federal Employer's Liability Act, though there are intrastate cars in the train. *Horton v. R. R.*, 146.

17. *Railroads—Master and Servant—Federal Employer's Liability Act—State Courts—Jurisdiction—Pleadings.*—When the Federal Employer's Liability Act is especially pleaded and relied on in an action for damages for personal injuries brought in the State court, a recovery thereunder may be had when the cause of action falls within its provisions. *Ibid.*

18. *Railroads—Master and Servant—Defective Appliances—Negligence—Evidence.*– When there is evidence tending to show that the eye of the engineer of the defendant railroad company was injured by an explosion of the water-glass in the cab of his locomotive, while in the discharge of his duties, and that the injury could not have happened had the defendant, after notice, supplied the water-glass with the usual shield or guard in general use by railroad companies, it is sufficient upon the question of defendant's negligence. *Ibid.*

19. *Railroads—Master and Servant—Federal Employer's Liability Act—Contributory Negligence—Interpretation of Statutes.*—When a plaintiff has sued in the State court and has pleaded and brought his action within the provisions of the Federal Employer's Liability Act, contributory negligence is no bar to his recovery, and a motion to nonsuit upon the evidence on that ground cannot be sustained under the provisions of the act. *Ibid.*

20. *Railroads—Relief Department—Rules and Regulations—Sick Benefits—Ability to Work—Arbitration and Award.*—A contract which provides that the amount of damages which

RAILROADS—*Continued.*

may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement, is valid and will be upheld. Hence, if the principles governing arbitration and award were applicable, when a member of the relief department of a railroad company has voluntarily appealed to the advisory committee of the relief department of a railroad company, under the rules and regulations of the department, upon the question as to whether he was able to again resume his work, or continue to receive the sick benefits he had been drawing, he will be presumed to know the rules and regulations applicable and to have acquiesced in this method of adjustment, and is bound by the final decision of the committee, made in good faith and without oppression or fraud. The application of this doctrine to benefit societies and fraternal orders discussed by ALLEN, J. *Nelson v. R. R.*, 194.

21. *Railroads—Relief Department—Rules and Regulations—Knowledge Presumed.*—A member of a relief department of a railroad company cannot be heard to complain of an adverse decision of the advisory board thereof upon a matter he has appealed to it under the rules and regulations of the department, upon the ground of interest of the board in being selected by the company, for he is presumed to know how the board was constituted when he became a member and at the time he submitted his claim to its decision. *Ibid.*

22. *Railroads—Relief Departments—Contract—Rules and Regulations—Decisions of Department—Collateral Attack—Fraud.* The decision of the advisory board of a railroad company's relief department rendered on appeal to it by its member from the decision of the superintendent that he had sufficiently recovered of a sickness, not claimed through negligent act of the defendant, to resume work and cause the cessation of the benefits he had been receiving, cannot be collaterally attacked in an action brought in the courts, when rendered in good faith and in the absence of oppression or fraud. *Ibid.*

23. *Railroads—Negligence—Personal Injury—Light or Warnings—Contributory Negligence — Evidence — Nonsuit.*—Evidence tending to show that plaintiff was injured on a dark and cold night with a strong wind blowing, as he was walking along a path by the railroad track, about 2 feet from the end of the cross-ties, by being struck by defendant's switch engine running backward without lights or other warnings of its

RAILROADS—*Continued.*

approach, is sufficient upon the question of defendant's negligence, and while it may be possible in this case that the plaintiff was himself negligent in walking too near the track or attempting to cross it without looking and listening, contributory negligence cannot be inferred as a matter of law, and a motion to nonsuit upon the evidence should not be sustained. *Hammett v. R. R.*, 322.

24. *Railroads—Rights of Way—North Carolina Railroad—Charter—Presumption of Grant—Developments—Interpretation of Statutes—Time.*—According to its charter provisions the North Carolina Railroad Company could acquire a right of way for its railroad by condemnation proceedings, and section 29 was intended to provide for instances where these proceedings had not been instituted and evidence of the consent of the owners had been lost or could not be produced. The charter should be interpreted as of the time the Legislature granted it, and under the conditions then existing, and thus the provision therein that, in the absence of a grant from the owner of the land, his right of action is barred if he fails to claim compensation within two years, is valid, the statute raising a presumption of a grant of the land on which the road is located, together with a space of 100 feet on each side of the center of the track. *R. R. v. Olive*, 142 N. C., 273, cited and applied. *Earnhardt v. R. R.*, 358.

25. *Railroads—Rights of Way—Nonuser—North Carolina Railroad—Grant—Owners' Inactivity—Presumption—Interpretation of Statutes.*—When the owner of land over which the North Carolina Railroad has been run has remained inactive for a period of two years after its completion, a presumption of a grant from the owner arises for the land on which the road is located, and for the width of the right of way provided by the charter. *Ibid.*

26. *Same—Owner's Improvements—Damages.—Semble*, that as the presumption of a grant by the owner to the North Carolina Railroad does not arise except in the absence of a contract, when permanent structures erected by the owner within 100 feet of the main line are used for a long time without objection, in localities where it was customary to acquire rights of way by purchase, less in width than 100 feet, the statutory presumption would not arise, when no evidence of a contract was introduced by either party; and damages for permanent

RAILROADS—*Continued.*

improvements on the right of way made in good faith may be recovered when the right of way is subsequently taken for the use of the railroad. *Ibid.*

27. *Same—Rights of Railroad.*—When the North Carolina Railroad Company has acquired lands over which its road extends by reason of the presumption of a grant from the owner under the provisions of the statute, the subsequent use of an unoccupied part of the right of way by the owner, or those claiming under him, cannot affect the right of the company thereto from time to time as the development of its business demanded. *Ibid.*

28. *Same—Decision of Railroad.*—It rests in the judgment of a railroad company to determine the necessity for the use of an unoccupied portion of its right of way in the development of its business. *R. R. v. Olive*, 142 N. C., 273, cited and applied. *Ibid.*

29. *Lessor and Lessee—North Carolina Railroad—Southern Railway—Right of Way—Nonuser—Occupation of Owner—Rights of Lessee.*—The lease by the North Carolina Railroad Company to the Southern Railway Company of its road, franchise, and rights of property, to be operated by the latter, is a valid one; and as the North Carolina Railroad has, under its charter, the right to an unused part of its right of way for laying a double track in the development of its business, the same right extends to the Southern Railway Company under the lease. *Ibid.*

30. *Railroads—Permission to Use Track—Collision—Time Limit—Negligence—Contributory Negligence—Last Clear Chance—Issues—Evidence—Questions for Jury.*—The plaintiff railroad company applied to the defendant railroad company, a connecting line, for permission to go upon its main line to back cars upon a siding to be taken by the latter's train, and at first was refused permission on account of the schedule time of defendant's train, but later, on being informed this train was late, was given ten minutes within which to place said cars. While the plaintiff's train was on the defendant's main line preparing to back the cars into position, it was run into and damaged by one of defendant's trains where the track was straight for a mile and free from obstacles to the view. There was conflicting evidence as to whether the collision took place within or after the ten minutes of the permission: *Held*, a question for the jury: (1) if the collision occurred within the ten minutes allowed, the issue as to defendant's negligence should be answered in

RAILROADS—*Continued.*

plaintiff's favor; (2) the plaintiff's contributory negligence would depend upon its negligent failure to get its train out of the way in the time limited under the rules of law properly applicable, to be determined on the entire facts relevant to the inquiry, including the fact that it was there by permit from defendant company, and with the purpose at the time of the impact of backing its train upon a siding; (3) if the collision occurred after the ten minutes permit it would amount as a conclusion of law to contributory negligence, under the duties imposed upon the plaintiff under the circumstances, continuing to the time of the impact; (4) the findings upon the issues of negligence and contributory negligence would exclude the necessity of an issue of the last clear chance. *R. R. v. R. R.*, 369.

31. *Same—Proximate Cause—Instructions—Appeal and Error.*—Under the circumstances of this case, instructions as to whether the plaintiff's train remaining upon the defendant's track after the expiration of its ten minutes permit was or was not the proximate cause of the injury received by a collision from defendant's train on its main line, with its imminent chances of arrival: *Held*, reversible error to defendant's prejudice, for which a new trial is granted. *Ibid.*

32. *Railroads—Use of Track—Time Permit—Collision—Negligence—Counter Damage—Questions of Law.*—The plaintiff railroad company received permission from the defendant railroad company for its train to go upon the latter's main line for the space of ten minutes for the purpose of placing cars upon a siding to be taken by the latter's train. While doing so, the train of the defendant, imminently expected, arrived and collided with the plaintiff's train where the track was straight and unobstructed for a mile: *Held*, whether the collision occurred within or beyond the time limit permitted, the defendant cannot recover on its counter-case for damages, as plaintiff's entry on its track was by its permission, and the attendant circumstances showed that by the exercise of reasonable care the defendant's employees had ample opportunity to have stopped its train and avoided the injury. *Ibid.*

33. *Railroads—Negligence—Derailment—Unsafe Road—Appliances—Presumptions—Verdict, Directing.*—When the evidence is not conflicting and tends to show that the plaintiff was injured while operating defendant's train, by a derailment upon an unsafe roadbed, with unusually dangerous grades and curves, and that the equipment used was defective, the

RAILROADS—*Continued.*

trial judge may properly direct the jury to answer the issue as to negligence in the affirmative if they found the facts to be as testified. *Worley v. Logging Co.*, 490.

34. *Same—Principal and Agent—Disobedience of Orders—Further Orders — Vice-principal — Evidence—-Instructions.*—When in an action for damages to an engineer operating defendant's train run by steam power, there is evidence tending to show that the injury complained of was caused by a derailment upon an unsafe roadway, and that in the train was a very unsafe car which the superintendent of the defendant company told the plaintiff not to take upon his train again, with further evidence that the car was thereafter loaded with lumber and the plaintiff instructed by another vice-principal of the defendant to take it with him on the occasion of the injury: *Held*, there being no evidence on defendant's part tending to show that its employee who instructed the plaintiff to take the loaded car on the train was not a vice-principal of defendant of equal dignity of the superintendent, it could not avail itself of an instruction precluding recovery if the jury found that the injury would not have occurred had plaintiff obeyed the order of the superintendent not to take the car out again. *Ibid.*

RAPE.

1. *Rape—Assault with Intent—Assault on Woman—Interpretation of Statutes — Proviso—Age—Indictment—Allegations—Defense.*—By statute, Revisal, 3620, as amended by the Laws of 1911, ch. 193, the punishment for "assaults, assaults and batteries, etc.," is limited to a fine not exceeding $50 or imprisonment of thirty days in certain instances: *Provided*, among other things, that it shall not apply to an assault by a man, or by a boy over eighteen years of age, upon a woman: *Held*, it is for the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case from the proviso, and it is not necessary to the validity of the bill that it state that he was over that age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. *S. v. Smith*, 578.

2. *Same—Habeas Corpus.*—The prisoner was convicted and sentenced to the county jail for a term of two years and assigned to work on the public roads under the provisions of Revisal, sec. 3620, for assaulting a woman. After submitting to his

RAPE—*Continued.*

sentence and serving thirty days of it, he sued out a writ of *habeas corpus*, claiming that the sentence was excessive, on the ground that the bill of indictment had not alleged that he was more than eighteen years of age at the time of the commission of the offense, and therefore, having worked out his lawful sentence, he should be discharged. The court construes together Revisal, sec. 1427, relating to the jurisdiction of courts of justices of the peace in their counties, when no deadly weapon is used; section 3268, providing that "on a trial of any person for rape, when the crime charged shall include an assault upon the person," and there is a conviction of the less offense, "the court shall have power to imprison the defendant, if found guilty of an assault, for any term now allowed in cases of conviction when the indictment was originally for an assault of like character," and said section 3620, and holds that, upon conviction of a simple assault and battery upon a woman, without alleging an intent to commit rape, the prisoner, over the age of eighteen years, can be punished at the discretion of the court, without any allegation in the bill as to his age, it being a matter for him to show, if the fact existed, that he was not over the age specified, which, if proven, would except him from the general provision of section 3620. *Ibid.*

3. *Rape, Assault on Woman—Intent—Allegations—Age—Indictment—Defense—Interpretation of Statutes.*—When an indictment charges an assault with the intent to commit rape, the prisoner may be convicted of an assault upon a woman (Revisal, sec. 3268); and if it is found that he was over eighteen years of age at the time the offense was committed, he may be punished as for an aggravated assault, whether his age is stated in the indictment or not. Revisal, secs. 3268, 3620. *Ibid.*

4. *Indictment—Assault—Rape—Jurisdiction Concurrent—Magistrate's Cognizance—Burden of Proof.*—It is not necessary for a bill of indictment charging assault with a deadly weapon, or with intent to commit rape, to show affirmatively the jurisdiction of the Superior Court, when that court and a justice's court have concurrent jurisdiction, if the latter court had not "proceeded to take cognizance of the crime within twelve months after its commission"; for it is for the defendant to show, as matter of defense, the fact that jurisdiction had been thus taken. Revisal, sec. 1427. *Ibid.*

RATIFICATION. See Attorney and Client, 5; Principal and Client, 1, 2, 8.

REASONABLE CARE. See Negligence, 17.

RECEIPTS. See Evidence, 31.

"RECENT POSSESSION." See Instructions. 20; Evidence, 100.

RECORDARI. See Appeal and Error, 17.

RECORDER'S COURT. See Courts, 21, 22.

RECORDS. See Liens, 3, 4.

REFERENCE. See Appeal and Error, 41.

1. *Appeal and Error—Reference—Findings—Evidence.*—The facts found by the referee and confirmed by the trial judge are not reviewable on appeal where there is evidence to support them; and exceptions to such findings, that they are "contrary to the weight of the evidence," cannot be sustained. *Jeffords v. Waterworks Co.*, 10.

2. *Appeal and Error—Account—Reference—Slander—Damages—Appeal Premature—Practice.*—In an action against a bank, alleging certain errors in the accounts of the bank with the plaintiff and asking correction thereof, and seeking damages for slander, injury to credit, and the wrongful protesting of plaintiff's checks, an order of reference was made as to the matters of account, expressly reserving for trial the issues in the pleadings as to slander, etc.: *Held*, an appeal from the judgment upon exceptions to the referee's report, before the trial upon the issues reserved, is premature, and will be dismissed without prejudice. *Beck v. Bank*, 105.

3. *Reference—Scope of Order—Admissions—Defect Cured—Tenants in Common.*—A tenant in common resisted the partition of the lands in controversy upon the grounds of an alleged contract made by the others to convey their interest to him, which the clerk transferred to the civil-issue docket, whereupon it was referred and the referee's report confirmed and judgment duly entered, after all objections to the report had been withdrawn: *Held*, in this case the matters embraced in the pleadings were within the purview of the order of reference, except the tenancy in common, and the necessity of sale of the lands, which were admitted, and as all exceptions to the report were withdrawn, any defect in the order of reference, if it existed, is cured. *Coltrane v. Laughlin*, 282.

4. *Reference Set Aside—Discretion—Appeal and Error.*—The setting aside an order of reference by the trial judge upon the exercise of a lawful discretion is not reviewable on appeal. *Lance v. Russell*, 448.

REFERENCE—*Continued.*

5. *Same — Consent Reference — Consent of Parties — Power of Courts—Jurisdiction.*—Neither party to a consent reference can withdraw therefrom, and it cannot be set aside except by mutual consent, or by the court, retaining jurisdiction, for good cause shown. *Ibid.*

6. *Reference—Set Aside—"Good Cause Shown"—Appeal and Error.*—The judge, by finding as a fact that one who was a necessary party to be bound had not consented to the reference, and that the objecting party had therein been misled, establishes a "good cause shown," and his action in setting aside the former order and report of the referee thereon is not error: *Ibid.*

7. *Reference—Findings of Fact—Evidence—Appeal and Error.*—The findings of fact by the referee upon competent evidence, confirmed by the trial judge, are not reviewable on appeal. *Church v. Dawson*, 566.

8. *Same—Exceptions—Error Assigned—Procedure.* — The Court will not review exceptions of law to a referee's report unless they are passed upon by the trial judge and unless the judge's rulings are especially assigned as error in the transcript on appeal sent to the Supreme Court. *Ibid.*

9. *Reference—Trial by Jury—Exceptions—Issues Tendered—Procedure.*—A party to a compulsory reference should not only have proper exceptions entered, but tender the issues arising from the evidence and attach them to his exceptions to the referee's report when he desires to preserve his right to a trial by jury thereon. *Ibid.*

10. *Reference — Exceptions Abandoned Below — Waiver.*—Exceptions to a referee's report abandoned before the trial judge are deemed as waived on appeal. *Ibid.*

REFORMATION. See Pleadings, 19; Judgments, 7.

REFORMATORY. See Constitutional Law, 10, 13; Habeas Corpus, 1, 2, 3, 4.

REGISTER OF DEEDS. See Penalty Statutes, 1, 2, 3, 4, 5.

1. *Indictment—Mutilation of Records — Tax List — Register of Deeds.*—An indictment charging that defendant "did unlawfully, willfully, and corruptly, and with fraudulent intent and purpose, take from the office of the register of deeds . . . the tax books" for a certain year, the books having been deposited in the register's office as ordered by law, and "did unlawfully, maliciously, willfully, and fraudulently obliterate,

REGISTER OF DEEDS—*Continued.*

injure, and change the said tax book" for the certain year, "a record required to be kept by the register of deeds," is within the terms of Revisal, 3508. *S. v. Gouge*, 602.

2. *Same—Tax Book—Record—Indictment—Interpretation of Statutes.*—The tax book of the register of deeds is a book of records required to be kept by the register of deeds, and it falls within the meaning of Revisal, 3508, making it an indictable offense under the conditions therein stated for their obliteration, etc. *Ibid.*

3. *Same—Register of Deeds—Clerk to Board County Commissioners—Interchangeable Positions—Interpretation of Statutes.*—The register of deeds is *ex officio* clerk to the board of county commissioners (Revisal, 2666), and the two positions are not separate offices, but used interchangeably in the statute (Revisal, 5238, 5239, 5240), and it is provided (Revisal, 5237) that the tax book to be made out by the register of deeds "shall remain in the office of" the clerk of the board of commissioners, and *Held*, a charge of an unlawful, etc., obliteration of the tax books required to be kept by the register of deeds meets with the requirements in that regard of Revisal, 3508. *Ibid.*

4. *Register of Deeds—Copy of Abstract to Auditor—Requirements.* The register of deeds is not required to keep in his office a copy of the abstract from the tax book which the statute directs him to send to the State Auditor. *Ibid.*

5. *Register of Deeds—Tax Books—Township Totals—Mutilation—Indictment—Interpretation of Statutes.*—While the statute does not require the total tax for each township to be put in the tax book or record of the computation of taxes for a county, it is a customary and convenient practice, and when such has been done, a mutilation or change of the totals on the record falls within the meaning of Revisal, 3508, and is an indictable offense when its provisions have been violated; besides, objections, in this respect, relate to matters of proof and not to the sufficiency of the indictment. *Ibid.*

6. *Indictment — Tax Books — Register of Deeds — Mutilation — Township Totals — Auditor's Abstract — Parol Evidence.*— Upon a trial under an indictment of a deputy sheriff for changing the township totals of taxation for fraudulent purposes respecting a settlement thereof, testimony of a witness to the effect that the abstract which he made and sent to the Auditor was a correct copy from the tax list, and that the books now show a mutilation and change of the tax lists as

REGISTER OF DEEDS—*Continued.*

to these township totals, amounting to a certain sum, which the defendant is charged with drawing from the bank of deposit for his own use, is competent, as the abstract sent the Auditor was made from unchanged items and could in no wise be affected by the alteration of the township totals. *Ibid.*

7. *Same.*—An abstract made by a witness for the State Auditor from the tax list is but a written declaration of the witness which he at one time made as to the amount of the unaltered totals, and it is not necessary that this abstract be produced under an indictment for violation of Revisal, 3508, for the witness to state the township totals therein, for he may now testify what the total was, the parties being entitled to produce the abstract in corroboration or rebuttal, as the case may be, and in this case the addition of the unaltered items was introduced, from which the jury could ascertain whether the totals were correct or not. *Ibid.*

8. *Indictment—Mutilation of Records—Tax Books—Defalcation of Sheriff—Evidence.*—Evidence that a deputy sheriff altered the township totals of taxation taken from the tax book and drew the difference in gold from the bank in order that his defalcation might not be traced to him, is simply that of a circumstance competent for what it is worth, as tending to show illegality and fraud, under indictment for violating the provisions of Revisal, 3508. *Ibid.*

9. *Same — Character Witnesses — Cross-examination.*—A deputy sheriff was indicted for unlawfully mutilating the township totals of taxation (under Revisal, 3508) made out by the register of deeds and in his office, in order to conceal his defalcation: *Held*, competent on cross-examination of defendant's witness, for him to state that he had threatened the defendant with proceedings before a Superior Court judge before he would show his books or state the amount he had paid over, and it was not objectionable as an attack on the good character of the witnesses by proving specific acts of misconduct. *Ibid.*

REGISTRATION. See Liens, 5; Deeds and Conveyances, 19.

RELEASE. See Evidence, 75, 77, 79.

RELIEF DEPARTMENT. See Railroads, 4, 5, 6, 7, 20, 21, 22.

RES IPSA LOQUITUR. See Evidence, 83.

RESPONDEAT SUPERIOR. See Master and Servant, 18, 19, 20, 31.

RESULTING TRUSTS. See Trusts and Trustees, 7.

RETRAXIT. See Evidence, 62.

REVERTER. See Railroads, 2.

REVISAL.

SEC.

366. Absence of defendant from the State is excluded from the three-year statute of limitations. *Arthur v. Henry*, 393.

400. One cannot maintain an action on contract which he has assigned to another who is not a party. *Vaughan v. Moseley*, 156.

519 (3). To restrain the cutting of timber, the court must find a *bona fide* contention; and a restraining order should not be refused solely on the ground that the sizes of the trees could not be ascertained. *Kelly v. Lumber Co.*, 175.

608. Judge has no discretion to extend time for docketing an appeal from a justice's court beyond the ten days allowed by statute before the commencement of the term. *Peltz v. Bailey*, 166.

686. This section has no application to a suit by creditors to set aside a deed from husband to wife for fraud. *Rose v. Bryan*, 173.

687. This does not apply to personal property exemptions. *Gardner v. McConnaughey*, 481.

692. This does not apply to personal property exemptions. *Gardner v. McConnaughey*, 481.

695. Personal property exemption should be set aside in specific articles to the debtor, or he be allowed to select. *Gardner v. McConnaughey*, 481.

844. An action by a tax collector for commissions, because wrongfully deprived of his right to collect the taxes, is against the one who collected the taxes, for money had and received to his use. *Graded School v. McDowell*, 316.

915. When entries of record referring to schedule filed gives sufficient notice of lien claimed for material, etc. *Fulp v. Power Co.*, 157.

961. A husband, remaining in possession of land conveyed, in fraud of creditors, to his wife, may claim homestead. *Rose v. Bryan*, 173.

963. A husband, remaining in possession of lands conveyed, in fraud of creditors, to his wife, may claim homestead. *Rose v. Bryan*, 173.

REVISAL—*Continued.*

SEC.

1243. Personal service of summons on Secretary of State for corporations having property or doing business here, is constitutional. *Currie v. Mining Co.*, 209.

1292. Wife may sue for support of herself and children without seeking a divorce. *Ellett v. Ellett*, 161.

1427. This section construed with sections 3268, 3620, with reference to jurisdiction for an assault upon a woman, and the exception as to the age of the offender. *S. v. Smith*, 578.

1562. Alimony allowed wife *pendente lite*, when husband about to remove property from the State, upon persistent acts on his part. *Sanders v. Sanders*, 229.

1563. Alimony allowed wife *pendente lite* when husband about to remove property from the State. *Sanders v. Sanders*, 229.

1566. Alimony allowed wife *pendente lite* when husband about to remove property from the State. *Sanders v. Sanders*, 229.

1645 (9). Depositions are competent when deponent resides in another State, and was not here at time of trial. *Jeffords v. Waterworks Co.*, 10.

1652. A commissioner to take depositions, otherwise regular, need not necessarily name the particular witness to be examined. *Jeffords v. Waterworks Co.*, 10.

1691. An administrator is not required to show that payment of deceased's contract was not a contract in futures, when the allowance to him for that reason is resisted. *Overman v. Lanier*, 544.

2026. The object of this section is to give public notice of a claim for lien, the amount, material supplied and work done, and on what property, etc., and certain entries entered of record, referring to schedule, *Held* sufficient. *Fulp v. Power Co.*, 157.

2083. Construed as *in pari materia* with sections 2088, 2090, and before issuing a marriage license it must appear to register of deeds, as to a reasonably prudent person, that there are no legal objections. *Joyner v. Harris*, 295.

2088. Construed as *in pari materia* with sections 2083, 2090, and before issuing a marriage license it must appear to the register of deeds, as to a reasonably prudent person, that there are no legal objections. *Joyner v. Harris*, 295.

REVISAL—*Continued.*

SEC.

2090. Construed as *in pari materia* with sections 2083, 2088, and before issuing a marriage license it must appear to the register of deeds, as to a reasonably prudent person, that there are no legal objections. *Joyner v. Harris,* 295.

2116. Certain agreements for separation between husband and wife are valid. *Ellett v. Ellett,* 161.

2666. Obliterating tax book in register of deeds' office is an indictable offense under Revisal, 3508. *S. v. Gouge,* 602.

3127. "And" should be construed "or," with reference to where a holographic will should be found; and "valuable" papers, etc., include fire insurance policies. *In re Jenkins,* 429.

3244. A bill of particulars as to which stream was polluted (Revisal, 3862) should be asked for, and a motion in arrest of judgment will not be granted. *S. v. Corbin,* 619.

3268. This section construed with sections 1427, 3620, with reference to jurisdiction for an assault upon a woman, and the exception as to the age of the offender. *S. v. Smith,* 578.

3271. The verdict must fix the crime of murder in first degree before sentence. *S. v. Murphy,* 614.

3333. The felonious breaking into a house sufficiently charged in the bill; and the entry is lawful if connived at by the owner. *S. v. Goffney,* 624.

3508. Taking tax book from register of deeds' office and obliterating it, are indictable offenses. *S. v. Gouge,* 602.

3620. It is for a prisoner charged with an assault upon a woman to show he was under the age excepted from the statute. *S. v. Smith,* 578.

3712 (a). Loaning money on household and kitchen furniture, made an indictable offense, is not repugnant to the fourteenth amendment to the Federal Constitution, as an unlawful division of money lenders into two classes. *S. v. Davis,* 648.

3862. An indictment for polluting a stream is sufficient if language of the statute is followed; and a motion in arrest of judgment, when it is not stated which stream was polluted, will not be granted. *S. v. Corbin,* 619.

4691. Foreign organizations with local branches here authorized to pay sick benefits must be licensed by and under the supervision of the Insurance Commissioner. *S. v. Arlington,* 640.

REVISAL—*Continued.*

SEC.

4706. Foreign organizations with local branches here, authorized to pay sick benefits, are required to pay license tax. *S. v. Arlington*, 640.

4715 (3). An agent or organizer of a foreign organization with local branch here, authorized to pay sick benefits, must pay insurance tax. *S. v. Arlington*, 640.

4794. Foreign fraternal insurance orders are subject to the same regulations here as foreign insurance companies, except as to the deposit and paid-up capital. *S. v. Arlington*, 640.

5237. Obliterating tax book in register of deeds' office an indictable offense, under Revisal, 3508. *S. v. Gouge*, 602.

5238. Obliterating tax book in register of deeds' office is an indictable offense, under Revisal, 3508. *S. v. Gouge*, 602.

5239. Obliterating tax book in register of deeds' office an indictable offense under Revisal, 3508. *S. v. Gouge*, 602.

5240. Obliterating tax book in register of deeds' office an indictable offense under Revisal, 3508. *S. v. Gouge*, 602.

RIGHTS OF WAY. See Railroads, 1, 29.

RULE IN SHELLEY'S CASE. See Wills, 1.

RULE OF PRUDENT MAN. See Negligence, 41; Executor and Administrator, 5.

SAFE APPLIANCE. See Master and Servant, 10, 11, 12, 13, 16, 38, 39, 40, 41, 42.

SAFE PLACE TO WORK. See Master and Servant, 1, 2, 4, 5, 6, 8, 10, 11, 12, 13, 27, 28, 29, 39, 40, 41, 42, 46.

SALES.

1. *Judicial Sales—Trustees — Commissions — Agreement—Subsequent Agreement—Interpretation of Contracts.*—In this case, *Held*, that a trustee of the funds arising from the sale of certain lands under judicial proceedings should not be entitled to certain commissions under an agreement entered into with the parties in interest, for the reason that these commissions were included under a certain other and subsequent agreement in a larger sum for his full services. *Henry v. Hilliard*, 572.

2. *Judicial Sales—Trustees—Commissions—Agreement—Report—Interpretation of Contracts.*—An agreement entered into by the parties and a trustee appointed by the court to hold and

SALES—*Continued.*

disburse the proceeds of sale of lands under judicial proceedings, which specifies that the report of the trustee "is considered as correct as to all debts and credits that have passed through his hands, except as modified by this agreement," does not authorize a commission claimed by the trustee in his report which the agreement itself includes in a larger amount for full commissions which are to be paid him. *Ibid.*

3. *Judicial Sales—Trustees—Order of Court—Disbursements in Excess.*—A trustee appointed by the court in judicial proceedings to hold and disburse moneys arising from the sale of lands is not entitled to a credit of a larger amount paid to certain parties in interest than ascertained and fixed by an order in the case made by the court, as a payment in excess of that sum is made without authority. *Ibid.*

4. *Exemptions—Personalty—Property Exempt — Levy — Time of Sale.*—The judgment debtor is entitled to have his exemption in personal property ascertained up to and just before the process of execution under the judgment is executed by a sale, and to select the articles as provided by statute; and, therefore, when a report of the jury of assessors has been declared void and another allotment is ordered to be made, it is error to include in the reallotment articles of personalty which the judgment debtor may have consumed since the allotment under the void report. The distinction pointed out when a homestead is allotted under Revisal, secs. 687 and 692, by CLARK, C. J. *Gardner v. McConnaughey*, 481.

SCHEDULE. See Liens, 4.

SEDUCTION.

Seduction—Letters—Written Admissions — Detached Portions — Severable Matters—Evidence.—In an action for seduction under promise of marriage, portions of letters written by defendant which contain severable and distinct declarations or admissions tending to establish his guilt are admissible in evidence, and afford the best evidence of their contents. Admissions of this character are not ordinarily considered to be within the best evidence rule. *S. v. Corpening*, 621.

SERVICE OF CASE. See Appeal and Error, 7, 8, 9.

SEWERAGE. See Bond Issues, 5, 6; Cities and Towns, 6.

SHERIFFS. See Indictments, 11; Taxation, 1, 2, 3, 4, 5.

SICK BENEFITS. See Railroads.

SLANDER.

Slander — Intent — Evidence — Larceny—"Took" and "Stole" — Words and Phrases—Unequivocal Terms—Burden of Proof —Questions for Jury.—In an action for damages for slanderous words spoken by defendant of plaintiff, the evidence for plaintiff tended only to show that defendant on several occasions had said to others that his brother had caught the plaintiff "taking some pokes of cotton out of his patch the night before," which he (the defendant) believed to be true; that on another occasion the plaintiff and defendant were together with the purpose of the latter to "make up the trouble," the former denying that he had taken the cotton, the latter insisting that he had, from the information his brother had given: *Held*, the evidence was not an unequivocal statement that plaintiff had stolen the cotton, and being capable of a different construction, was properly submitted to the jury, with the burden of proof on the plaintiff to show whether the words, in view of the circumstances under which they were used, naturally imported that the plaintiff had stolen the cotton, and whether defendant so intended to state. *Fields v. Bynum*, 156 N. C., 413, cited and distinguished. *McCall v. Sustair*, 179.

SPECIFICATIONS. See Deeds and Conveyances.

SPECIFIC PERFORMANCE. See Contract, 41, 42, 43.

SPECULATIVE DAMAGES. See Measure of Damages, 13.

STATUS OF LAND. See Attachment, 1.

STATUTE OF FRAUDS.

1. *Statute of Frauds—Contract to Convey Lands—Memoranda—Lawfully Authorized Agent.*—A memorandum of a contract to convey land, written at the request of the contracting parties and in their presence, sufficiently stating the terms and conditions of sale, designating the lands sold, with the names of the parties appearing therein, is sufficient to make a valid contract under the statute of frauds. *Wellman v. Horn*, 170.

2. *Same—Signing—Name in Memoranda.*—It is not necessary that a contract to convey lands be subscribed by the party to be bound thereby, and the requirements of the statute of frauds are met if his duly authorized agent write his name within a sufficient memorandum of the agreement. *Ibid.*

3. *Statute of Frauds—Contract to Convey Lands—Lawfully Authorized Agent—Parol Authority.*—The authority of a duly

STATUTE OF FRAUDS—*Continued.*

authorized agent of a party to be bound by a contract to convey lands need not be in writing under the statute of frauds. *Ibid.*

4. *Same—Description—Signing—Name in Memorandum.*—A, having agreed to sell his home place to B, the parties requested C to witness the terms and conditions of the sale, and B having given A his note in part payment of the purchase money, C, in the presence of A and B, wrote the following memorandum of sale: $5,000 January 2, 1911; $5,000 January 2, 1912. B to pay the above to A when he makes deed to A for B's home place, 3 October, 1910." C read this memorandum over to A and B, and they said it was correct. Be resisted suit to recover the purchase price on the ground of the statute of frauds: *Held,* C was the lawfully authorized agent of A to write the contract, within the meaning of the statute of frauds; the property contracted for was sufficiently described; the writing of A's name in the memorandum was a sufficient signing, and the contract is a valid one. *Ibid.*

5. *Statute of Frauds—Promise to Pay Debt of Another.*—A promise is not within the statute of frauds requiring that it be in writing and signed, to bind the promisor to answer the debt of another, if it is an original one based upon a consideration; and it is original, whether made before or at the time the debt is created, if the credit be given solely to the promisor or to both promisors as principals; or if it is based upon a new consideration of benefit or harm passing between the promisor and the creditor; or if it is for the benefit of the promisor and he has a personal, immediate, or pecuniary interest in the transaction, in which a third party is also obligor. *Whitehurst v. Padgett,* 424.

6. *Same.*—When the promise relied on to bind the promisor under the statute of frauds to pay the debt of another does not create an original obligation, and is collateral and merely superadded to the promise of another to pay the debt, who remains liable therefor, the statute applies and the second promisor is not liable upon his promise, unless it was reduced to writing and signed as required by the statute; and this is true whether his promise was made at the time the debt was created or afterwards. *Ibid.*

7. *Same—Landlord and Tenant—Assertion of Tenant—Direct Interest.*—When a tenant of a farm has applied to a merchant to furnish him with fertilizers for making the crop on the leased premises, saying that the landlord would pay for

STATUTE OF FRAUDS—*Continued.*

them, the assertion of the tenant will not of itself render the landlord liable; but if the latter, when called upon by the merchant at the time of the transaction, says, "All right, go ahead and furnish (the lessee) and I will see that you get the money," his words may amount to a binding and sufficient promise under the statute of frauds, as he had a direct and pecuniary interest in the making of the crop as the landlord of the first promisor. *Ibid.*

8. *Statute of Frauds—Landlord and Tenant—Joint Promisors—Evidence—Questions for Jury.*—In this case the question whether the landlord intended to become a principal with the lessee of his lands, in the debt for fertilizers furnished to make a crop thereon under his promise to see that the merchant got his money, was fairly submitted to the jury under correct instructions of the court upon the evidence. *Ibid.*

9. *Statute of Frauds—Landlord and Tenant—"Promise" Relied on—Evidence.*—Evidence tending to show that a landlord, at the time of the transaction, promised a merchant furnishing his tenant fertilizers with which to make a crop on his land, that he would "see" that the fertilizer was paid for, is sufficient evidence to go to the jury as to whether the merchant relied upon the promise at the time it was made, and furnished the fertilizer upon the faith of it. *Ibid.*

10. *Statute of Frauds—Contracts to Convey Lands—Memorandum—Writing Sufficient.*—A memorandum held a sufficient contract to convey lands under the statute of frauds, reading as follows: "Received of B. $5 to confirm the bargain on the purchase of the farm on which I now live," dated and signed by the vendor. *Bateman v. Hopkins*, 470.

11. *Statute of Frauds—Contracts to Convey Lands—Description—Identification of Lands.*—A description of lands, the subject-matter of a contract to convey, as "the farm on which I now live": *Held*, to be sufficiently defined to enforce specific performance upon the identification of the *locus in quo*. *Ibid.*

12. *Same—Consideration—Parol Evidence.*—The consideration for the lands contracted to be conveyed need not be expressed in the written memorandum or contract required by the statute of frauds, and may be shown by oral evidence. *Ibid.*

STATUTE OF FRAUDS—*Continued.*

13. *Statute of Frauds—Contract to Convey Lands—Vendor and Vendee—Consideration.*—In an action by the vendee against the vendor for specific performance of a contract to convey lands, it is not necessary that the written memorandum required by the statute of frauds set forth the obligation of the vendee to pay the purchase price, for by bringing his action the vendee agrees to perform the contract irrespective of the statute of frauds. It is only necessary that the memorandum be signed by the party to be charged, who is the defendant in this case. *Ibid.*

14. *Statute of Frauds—Contracts to Convey Lands—Specific Performance — Purchase Money — Tender—"Ready, Able, and Willing."*—In an action to enforce against a vendor specific performance of his contract to convey lands, which he seeks to avoid upon the ground that it is unenforcible under the statute of frauds, it is not required, to maintain the action, that the plaintiff show a tender of the purchase price before commencing his action or for him to pay it into court; for it is sufficient if he has ever been ready, able, and willing to comply, on his part, with the terms and conditions which the contract imposes on him. *Ibid.*

15. *Same—Reasonable Time Decreed.*—When specific performance of a contract is enforcible against the vendor of lands in the suit of the vendee, equity, looking to the adjustment of the rights of the parties, may decree that the plaintiff pay the purchase money into the court and otherwise comply with his contract, within a reasonable time, to be fixed by the court, and upon his failure to do so, his right to specific performance be denied and the action dismissed, and that if he does perform, on or before the last day named, the defendant execute a good and sufficient deed for the premises, properly acknowledged or proven, and deposit it with the clerk of the court, at a time to be named, to be delivered to the plaintiff, and when this is done, the money so deposited in court to be paid to the defendant. *Ibid.*

16. *Same—Appeal and Error — Notification in Decree — Costs.*—When the trial court decrees that the vendor of lands make deed to the vendee and file it with the clerk of the court, and that the vendee pay into court the purchase money, without fixing a time in which it is to be done, in an action for specific performance of a contract this Court will direct, when it appears that it should be done, that the order be modified by the lower court so that such reasonable time be specified. *Ibid.*

STATUTES. See Interpretation of Statutes.

1. *Condemnation — Damages — Legislative Authority — Vested Rights—Constitutional Law.*—The Legislature has the constitutional authority to provide that the special benefits to be derived to the owner of lands over which a county constructs a public road shall be an offset against damages sustained by the owner in having his lands thus taken for public use; and this requirement can be changed by the Legislature at any time before the rights of the parties are settled and vested by verdict and judgment. *Phifer v. Commissioners*, 150.

2. *Condemnation — Damages — Special Benefits — Offsets.*—Only those benefits which are special to the owner of lands taken by the county in constructing a public road across them can be considered as an offset to the damages claimed by him, and not such as he shares with other persons in similar circumstances, unless the statute provides differently. *Ibid.*

3. *Same—Speculative Damages—Evidence.*—In this action against the county for damages to plaintiff for taking his lands in the construction of a road across them, evidence was competent that the value of the lands would be increased because of the special benefits thus to be derived by the owner, and not objectionable as being speculative or remote. *Ibid.*

4. *Bond Issues—Precincts—Legislative Authority—Sinking Funds—Restricted Levy—Negotiable Instruments—Particular Fund.* A legislative act empowering the issuance of bonds by a precinct for building and maintaining, etc., its public roads, authorizing taxes to be computed and levied on all taxable property therein, does not restrict the payment of the bonds so as to render them nonnegotiable by providing a maximum rate of taxation upon the property and poll; and, further, that "no sinking fund shall be created within less than ten years from the date of issuing said bonds," but allowing the properly constituted authorities to use, for the purposes of the act, "such sums of money remaining after the interest on said bonds shall have been paid"; and the bonds issued thereunder containing an unconditional promise to pay a sum certain in money at a fixed time to bearer, are a compliance within the provision of our negotiable instrument act as to the negotiability of a paper, which indicates a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount. *Commissioners v. Bank*, 191.

5. *Bond Issues—Precincts—Legislative Authority—Tax Levy—Restrictions—Payment—Negotiable Instruments.*—A legislative authority to a precinct to issue bonds and levy taxes on

STATUTES—*Continued.*

all taxable property for the purposes of the act, does not affect the ultimate liability of the precinct for their payment in full by restricting the tax levy to a certain amount upon the property and poll. *Ibid.*

6. *Counties—Agencies of Government—Legislative Discretion—Annexation of Territory.*—Counties being agencies for the State for the convenience of local government, and under almost unlimited legislative control except where restricted by constitutional provision, it was within the power of the Legislature to enact into a valid law chapter 591, Public Laws of 1911, taking certain described territory from the limits of Cumberland County and including it within those of Harnett County; and except as to taxes levied previously to the enforcement of the act, and criminal cases theretofore commenced, as expressly provided in the act itself, the county of Cumberland and its officers may not further exercise any direct authority in the territory excluded therefrom. *Board of Trustees v. Webb,* 155 N. C., 379, cited and applied. *Commissioners v. Commissioners,* 514.

7. *Same—Taxation—Original Power—Roll-call Bills—Aye and No Vote—Constitutional Law.*—The power to exercise ordinary governmental functions, collecting taxes and the like, having been conferred originally on a county, it is not required that an act which adds territory to that county by taking it from an adjoining county, by a roll-call bill passed on separate days upon an "aye" and "no" vote, in compliance with section 14, Article II of the Constitution, for the county to exercise the right of taxation over the territory annexed, for such power already existed by virtue of the prior act of its creation; and the questions of contracting debts and the levy and collection of taxes to pay them are properly referable to the statutes, general or special, controlling in such matters. *Ibid.*

8. *Counties—Agencies of Government—Legislative Discretion—Mandatory Powers—Interpretation of Statutes.*—When a portion of the territory of one county is detached from it and added to another county, the burden of existent indebtedness and the apportionment thereof, in the absence of constitutional provision, and in so far as the inhabitants are concerned, is referred entirely to the legislative discretion; and when it appears from the act that the commissioners of each county "have full power and authority to properly adjust the share of the bonded and floating debt" outstanding of the county from which the territory is detached, "and to make an equitable levy of taxes thereon to cover the same and to

STATUTES—*Continued.*

provide for the collection and payment thereof," the power conferred imposes the duty for its exercise. *Ibid.*

9. *Legislative Acts—Ex Post Facto Laws—Definition.*—An *ex post facto* law is one which either makes that a crime which was not a crime at the time the offense was committed or imposes a heavier sentence than that which was prescribed by the law at the time the offense was committed. *S. v. Broadway*, 598.

10. *Legislative Acts—Ex Post Facto Laws—Interpretation of Statutes.*—Repeals by implication are not favored by the law, and an act which merely leaves it in the discretion of the trial judge to impose a longer sentence for an offense than that prescribed by a former act, without changing the constituent elements of the crime, does not repeal the former act; and a subsequent sentence for the crime committed prior to the time of the enforcement of the second act, which does not exceed the limited time of punishment prescribed by the prior act, is valid. *Ibid.*

11. *Statute — Police Powers — Local Application — Constitutional Law.*—Public-local acts, passed by the Legislature in the exercise of police power, which apply only to police regulation, are valid. *S. v. Blake*, 608.

12. *Same—Game Laws — Quail — Closed Season — Bird Dogs at Large.*—A statute enacted to protect the game birds of a certain county is a valid exercise of the police powers of the State, within the discretion of the Legislature, and hence there is no constitutional objection to an act which makes it "unlawful for any one to permit his or her setter or pointer dog to run at large during the closed season for quail," applying to a designated county alone. *Ibid.*

13. *Constitutional Law—Statutes—Game Laws—Closed Season—Dogs at Large—Cruel and Unusual Punishments.*—A statute which makes it unlawful for the owners of bird dogs to permit them to run at large during the closed season for quail in a certain county, making the offense punishable by fine or imprisonment, is not objectionable on the ground that our Constitution forbids "cruel and unusual punishment." *Ibid.*

14. *Constitutional Law—Statutes—Punishment — Legislative Discretion—Judiciary—Excessive Punishment.*—Section 14, Article I of our State Constitution restricts the judiciary from imposing excessive punishments where the Legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. *Ibid.*

STATUTES—*Continued.*

15. *Statutes—Alternate Punishments—Discretion of Courts—Leniency—Appeal and Error.*—When a statute makes certain acts an offense and punishable by "fine and imprisonment," the trial judge may impose either punishment or both; but if it were otherwise, a defendant has no ground for appeal that both sentences were not imposed on him. *Ibid.*

16. *Recorders' Courts—Jurisdiction Exclusive—Legislative Powers—Corporate Limits—Constitutional Law.*—Section 27, Article IV of the State Constitution, as modified by section 14 of the same article, authorizes and empowers the Legislature to establish special courts in cities and towns and give them exclusive jurisdiction of misdemeanors committed within the corporate limits. *S. v. Doster*, 634.

17. *Same.*—An act creating a recorder's court for an incorporated town, conferring exclusive jurisdiction over offenses cognizable in courts of a justice of the peace, is void in so far as it seeks to extend the jurisdiction and make the same exclusive as to such offenses committed in the township beyond the corporate limits of the town. *Ibid.*

STREETS. See Highways; Cities and Towns, 17.

STENOGRAPHER'S NOTES. See Appeal and Error, 27, 30, 37.

SUMMONS. See Process.

SUPERIOR COURTS. See Courts.

SURVIVORSHIP. See Husband and Wife.

TAXATION. See Bond Issues.

1. *Sheriffs—Collection of Taxes—Balance Due—Counterclaim.*—In an action to recover from a sheriff a balance of taxes collected by him and due, a counterclaim or debt of any kind, however valid, cannot be sustained. *Graded School v. McDowell*, 316.

2. *Same—Mandamus—Procedure.*—A graded school and county commissioners sued the sheriff for taxes collected which should have been paid the school, and the defendant set up a counterclaim that for certain previous years the county commissioners had wrongfully appointed another to collect these taxes, and that the commissions thus due him should be deducted from plaintiff's claim: *Held*, (1) the sheriff's remedy was by mandamus against the county commissioners at the time alleged, to have the tax books placed in his hands by the county commissioners, and an injunction to

TAXATION—*Continued.*

prevent the payment of the commissions to the collector alleged wrongfully to have been appointed, until his right had been decided; (2) or by suit against the collector alleged to have been wrongfully appointed, for the commissions paid to him. *Ibid.*

3. *Sheriffs—Commissions on Taxes—Speedy Trial—Procedure.*—The right to a speedy trial by a sheriff suing for commissions on taxes collected by one wrongfully appointed by the board of county commissioners is secured under Revisal, 833; and his interests are protected by the undertaking required by Revisal, 835. *Ibid.*

4. *Same—Trusts and Trustees—Bar to Action.*—The taxpayers are not required to pay commissions twice for the collection of taxes because the wrong party discharges the duties of collector, the remedy of the one wrongfully deprived being against the intruder who has thus deprived him of his commissions, in an action for money had and received to his use (Revisal, 844), and his failure to do so in his action to recover the office is a bar to an independent action therefor. *Ibid.*

5. *County Commissioners—Sheriff's Commissions—Official Capacity—Counterclaim—Cross-actions—New Matter.*—A sheriff in his answer to an action by a graded school and the county commissioners for balance of taxes collected by him, due and not paid over, may not set up a counterclaim for commissions on taxes for previous years collected by one wrongfully appointed for the purpose by the county commissioners, for this is a cross-action against the plaintiffs for their alleged wrongful act as county commissioners in their official capacity, which he could not maintain if brought directly. *Ibid.*

6. *Counties—Taxation—Original Power—Roll-call Bills—Aye and No Vote—Constitutional Law.*—The power to exercise ordinary governmental functions, collecting taxes, and the like, having been conferred originally on a county, it is not required that an act which adds territory to that county by taking it from an adjoining county, be a roll-call bill passed on separate days upon an "aye" and "no" vote, in compliance with section 14, Article II of the Constitution, for the county to exercise the right of taxation over the territory annexed, for such power already existed by virtue of the prior act of its creation; and the questions of contracting debts and the levy and collection of taxes to pay them are

TAXATION—*Continued.*

properly referable to the statutes, general or special, controlling in such matters. *Commissioners v. Commissioners,* 514.

TAX LIST. See Register of Deeds, 1, 2, 5.

TELEGRAPH COMPANIES. See Telephone Companies.

TELEPHONE COMPANIES.

1. *Corporations — Public Service—Breach of Contract—Torts—Measure of Damages.*—A telephone company, a public-service corporation operating under a public franchise, is responsible for its breach of duty in rendering the service it has undertaken to perform for one having contractual relationship with it, and when suffering special injury by reason of such breach, he is entitled to sue in tort, and, in case of recovery, to have his damages admeasured as in that character of action. *Carmichael v. Telephone Co.,* 21.

2. *Same—Telephone Companies—Payment of Rentals.*—The plaintiff having protested to defendant that he had paid for the rental of his telephone service at his home, claiming he had a receipt therefor which he had temporarily mislaid, but promised to produce, found upon returning home Saturday night that the telephone connection had been severed there in his absence and so continued until the following Monday morning, when he paid under protest and had his telephone service restored. There was conflicting evidence as to whether the plaintiff had actually paid the rental, the company protesting that the receipt was given by mistake as to the amount: *Held,* the plaintiff, when his cause of action has been established, may recover upon the tort arising from defendant's breach of contract. *Ibid.*

3. *Same—Mental Anguish—Duty to Avoid or Minimize.*—The plaintiff, in this case, having a right to sue a telephone company, a public-service corporation, in tort for wrongfully disconnecting his telephone service, evidence on the question of damages was competent which tended to show his suffering and anxiety naturally arising from the fact that his father-in-law was at the time in a hospital, supposed to be in a dangerous condition, which was known to the company, or its managing officers, and occasioned by the loss of the telephone service at such time, but not the suffering and anxiety caused by the placing and condition of the father-in-law; and in awarding any damages imputable to this source, it should be considered whether he did what he reasonably could have done to lessen his anxiety. *Ibid.*

TELEPHONE COMPANIES—*Continued.*

4. *Corporations—Telephones—Public Service—Tort—Willful and Wanton—Punitive Damages.*—In awarding damages to one whose telephone service has wrongfully been disconnected by a public-service telephone corporation, the jury may award such punitive damages in addition to compensatory damages as they may deem right and proper, when, in proper instances, they find the act was done maliciously or under such circumstances of willfulness on the part of the defendant as to show a wanton or reckless disregard of plaintiff's rights. *Ibid.*

TENANTS IN COMMON.

1. *Tenants in Common—Contracts to Convey—Deeds and Conveyances.*—In special proceedings for partition of lands by tenants in common, left them under the will of their father as remaindermen after the life estate of their mother, one of them set up a parol contract alleged to have been made by the others, to convey the lands upon consideration of his having moved upon the lands and taken care of the mother during her lifetime, and the issue thus raised was transferred to the civil-issue docket, and an order of reference made, whereupon it was found that no such contract was made, and it was so adjudged, and judgment duly entered, that the claimant account for the rents and profits for the time he was in possession cultivating the land, and that he recover a certain sum of money, which was the difference between this and the value of the improvements he had put upon the lands: *Held,* the tenant setting up the contract was estopped by the former judgment from suing to recover damages for breach of the alleged contract to convey the lands, and to condemn and apply the proceeds of a sale thereof to satisfaction of such damages; for while it may not have been necessary in the former action for the plaintiff in this one to have alleged the contract in order to recover for permanent improvements, it was included in the scope of the former inquiry, and concluded by the judgment therein. *Coltrane v. Laughlin,* 282.

2. *Reference—Scope of Order—Admissions—Defect Cured—Tenants in Common.*—A tenant in common resisted the partition of the lands in controversy upon the grounds of an alleged contract made by the others to convey their interest to him, which the clerk transferred to the civil-issue docket, whereupon it was referred and the referee's report confirmed and judgment duly entered, after all objections to the report had been withdrawn: *Held,* in this case the matters embraced

TENANTS IN COMMON—*Continued.*

in the pleadings were within the purview of the order of reference, except the tenancy in common, and the necessity of sale of the lands, which were admitted, and as all exceptions to the report were withdrawn, any defect in the order of reference, if it existed, is cured. *Ibid.*

3. *Tenants in Common—Plea—Sole Seizin—Jurisdiction—Ejectment—Procedure.*—In proceedings by tenants in common for partition of lands, a plea of sole seizin by one of them may be entered before the clerk, and on transfer to the court in term, the issue will be determined as in an action of ejectment. *Ibid.*

4. *Tenants in Common—Contract to Convey—Issues.*—In proceedings for partition of lands by tenants in common, a contention by one of them that the others had contracted to convey their interests therein to him, which is denied, directly involves the existence of the contract on an issue as to the fact of the tenancy in common. *Ibid.*

5. *Tenants in Common—Partition—Parties—Pleadings—Clerks of Court.*—In proceedings for partition of lands held in common, the petitioners are not entitled as matter of right to have a part only of the lands divided; and the defendants may, by answer, have included in the proceedings for a division such other lands as are held in common between the same parties. *Luther v. Luther*, 499.

6. *Same—Superior Court—Amendments.*—In proceedings for partition of lands held in common, it is proper for the petitioners to move before the clerk to strike from the defendant's answer allegations as to other lands not held in common by the same parties; but when on appeal, by order of court, the lands objected to are excluded from the proceedings, the judge can hear and determine all matters then embraced in the controversy, and proceed with the determination of the cause as amended. *Ibid.*

7. *Tenants in Common—Parties—Husband and Wife—Survivorship.*—In proceedings in partition of lands by tenants in common, under allegations in the petition that "D. and I. are joint tenants, as between themselves, of an undivided one-half interest in the said lands," it appearing that they are husband and wife: *Held*, the allegations mean an estate held by entireties with the right of survivorship, and entitled them to only one share in the land, and thus both were parties in interest in the land to be partitioned. *Ibid.*

TENDER. See Principal and Agent, 8; Contracts, 41, 42, 43.

TIMBER DEEDS. See Deeds and Conveyances.

TITLES. See Wills, 3; Evidence, 89; Contracts, 17; Deeds and Conveyances; Insurance, 15.

TORT. See Measure of Damages, 4, 20, 21, 22; Master and Servant, 31.

TRESPASS.

1. *Nonsuit—New Action—Trespass—Timber Trees.*—In an action for damages for trespass and cutting timber trees, the action may be again commenced more than twelve months after judgment of nonsuit if not otherwise barred by the statute of limitations applicable. *Meekins v. R. R.*, 131 N. C., 1; *Trull v. R. R.*, 151 N. C., 547, cited and distinguished. *Lumber Co. v. Hayes*, 333.

2. *Trespass—Timber Trees—Double Damages—Certain Counties—Interpretation of Statutes.*—In order to recover double damages for trespass and the unlawful cutting of timber trees in certain counties, Laws of 1907, ch. 320, the act complained of must come within the meaning of the words therein employed, *i. e.*, "without the consent of the owner (of the lands), with intent to convert to his (the trespasser's) own use," which means an intent to deprive the owner of the use, and to appropriate to the use of the taker, and was intended to cover a trespass where there was no *bona fide* claim of right, committed under circumstances indicating a purpose to prevent the true owner from asserting his right. *Ibid.*

3. *Same—Special Pleas.*—It is not necessary to specially plead the Laws of 1907, ch. 320, or refer to it in the complaint, when the act of the trespass and unlawful cutting of timber entitles the one upon whose lands the trespass is committed in the counties therein named to recover double the amount of the damages proved. *Ibid.*

4. *Trespass—Rightful Entry—Unlawful Acts.*—A lawful right of entry upon the lands of another will not justify its being done in a violent and insulting manner, regardless of the rights of the owner in his occupancy. *May v. Telegraph Co.*, 416.

5. *Same — Consequences of Acts — Knowledge — Direct Consequences—Measure of Damages.*—The employees of a telegraph company entering upon the right of way of a railroad company in the construction or maintenance of its telegraph line, within the scope of their agency and in furtherance of the business of the telegraph company, may bind the company in damages to the owner by the violence of their entry, and

TRESPASS—*Continued.*

the use of boisterous and profane language, the singing of lewd songs, and by the entrance into his dwelling and by acting in such a way as to cause injury to his wife from apprehension and mental shock; and evidence that she was in a delicate condition at the time, which aggravated the damage or rendered her more susceptible to the shock from the conduct described, may be considered by the jury in their award upon the issue as to the measure of damages, though the employees may not have been aware of it at the time complained of, when the tortious acts were the immediate, natural, and proximate cause of her injuries. *Ibid.*

6. *Same—Torts.*—When the tortious acts of the employees of a telegraph company, after rightfully entering on the lands of the owner, cause injury to the wife of the owner, it is not necessary that they should have contemplated the particular injury which their wrongful act produced, but the company is liable if the wrong was of such a character as to be injurious in its natural and proximate consequences. *Ibid.*

7. *Trespass—Rightful Entry—Unlawful Acts—Evidence—Assault and Battery—Torts—Consequential Damages.*—It is not necessary that the employees of a telegraph company entering rightfully upon the lands of the owner to perform their duties to their employer should actually commit an assault or a battery upon the owner or his family to make the employer liable for the consequent and proximate damages caused by their acts done in violence and in disregard of the owner's rights. *Ibid.*

8. *Trespass—Torts—Mental Suffering — Damages.*—The tortious entry or trespass upon the lands of another supports a right of action for physical injuries resulting from a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, and it is not necessary that there must have been some direct physical injury in order to render the defendant's acts tortious, in a legal sense, and consequently actionable. *Ibid.*

9. *Same—Parties—Owner—Injury to Wife—Recovery by Husband—Measure of Damages.*—The husband may recover in his own name in an action for damages done to his wife in consequence of an unlawful trespass of another for his separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife; and where the injuries are of a permanent nature a recovery by him may be had of such sum as will fairly compensate him for

TRESPASS—*Continued.*

her future diminished capacity to labor, but excluding from the damages recoverable any mental suffering upon his part, *Ibid.*

10. *Same—Punitive Damages.*—Punitive damages may be recovered by the husband for injuries inflicted upon his wife in consequence of an unlawful trespass of another, when the wrong is willful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, as an example to others and to vindicate justice. *Ibid.*

11. *Negligence — Children — Invitation Implied — Trespass.*—The defendant permitted a guy wire of its electric pole to become loose from its fastening in the ground and to hang down its pole at an exposed and uninclosed place within a few inches from a naked or uninsulated wire charged with a deadly or high voltage of electricity. This hanging guy wire was attractive to the boys, who would swing on it from the pole and back again, and who would congregate there for the purpose. About eight months after the guy wire became loose, the plaintiff's intestate, his 6-year-old son, while swinging, as indicated, was instantly killed by electricity passing suddenly through the guy wire from contact with a highly charged wire carrying the current: *Held*, the defendant knew or should have known of the dangerous conditions existing, and that children would be attracted to and were accustomed to play with the loose guy wire, and the technical defense that the plaintiff's intestate was a trespasser would be unavailing. *Ferrell v. Cotton Mills*, 528.

TRIAL BY JURY. See Constitutional Law, 13.

TRUSTS AND TRUSTEES.

1. *Wills—Trusts and Trustees—Equitable Estates—Execution of Trusts—Dower—Demurrer.*—The widow is not entitled to dower in an equitable interest in lands of her husband, which is subject to certain trusts and charges, until they are satisfied; and, hence, unless it appears in the widow's proceedings for dower that they have been satisfied, a demurrer thereto will be sustained. *Phifer v. Phifer*, 221.

2. *Same.*—A testatrix who had received a life estate from her father in a certain amount, with limitation over to her children, by her will declared that advances had been made from the trust estate to two of the children, R being one of them, and subject to the debts of the testatrix and to these advances, the said amount was to be equally divided among her children. It also appeared from the will that a

TRUSTS AND TRUSTEES—*Continued.*

part of the trust property had been given in part payment of a certain tract of land which the owner had contracted to convey to her. The widow of R claiming dower in certain of the lands, without allegation in the petition as to what had been done under the will, or that the trusts had been closed: *Held*, neither R nor his widow could have an estate in possession until these trusts and charges were satisfied, and that the widow of R consequently was not entitled to dower, upon the face of the petition, and hence a demurrer thereto should be sustained. *Ibid.*

3. *Same—Active Trusts—Account.*—A will declaring a life estate in one of certain trustees, with a limitation over to the children of testatrix after discharging certain debts and the execution of certain trusts, declares an active trust and vests no estate in the children until the execution of the trusts, but a mere right to have the trusts executed and the accounts stated, and there would, until then, be no seizin in one of the children of lands from which his widow's dower could be assigned. *Ibid.*

4. *Dower—Equitable Estates—Seizin of Husband—Personalty—Trusts and Trustees—Advancements—Distribution.*—An estate in lands of a deceased husband from which his widow's dower may be assigned, whether legal or equitable, must be one of which the husband was seized. *Semble*, in this case, the will should be construed that the land be sold and the proceeds divided, and therefore the interest of the husband would be personalty; that advancement had been made to the husband of more than his share of the fund; that the trustees were to divide the fund after certain children had been made to account for advancements, and *Patton v. Patton*, 60 N. C., 574, applied. *Ibid.*

5. *Trusts and Trustees—Bar to Action—Sheriffs—Taxation.*—The taxpayers are not required to pay commissions twice for the collection of taxes because the wrong party discharges the duties of collector, the remedy of the one wrongfully deprived being against the intruder who has thus deprived him of his commissions, in an action for money had and received to his use (Revisal, 844), and his failure to do so in his action to recover the office is a bar to an independent action therefor. *Graded School v. McDowell*, 316.

6. *Pleadings—Allegations—Cause of Action—Interpretation—Trusts and Trustees—Lands—Accounting—Possession.*—In an action for damages arising from a breach of trust of defendant in conveying at an inadequate price certain lands, con-

TRUSTS AND TRUSTEES—*Continued.*

veyed by the plaintiff to him, by deed absolute upon its face, but, in accordance with a contemporaneous unregistered agreement, to be held in trust by the defendant and sold at a fair price to pay a debt the plaintiff owed him, and the surplus to the defendant: *Held*, an allegation by plaintiff in his complaint, in substance, that he was resisting an action for possession by defendant's vendee, not sufficient to justify a dismissal of the action. *Lance v. Russell*, 448.

7. *Debtor and Creditor—Fraud—Husband and Wife—Improving the Wife's Property—Resulting Trusts.*—An insolvent husband who has put improvements on his wife's land in fraud of his creditors has no resulting trust in the land of his wife for the value of the improvement, the equity being only in favor of his creditors, who have the right to follow the fund invested for the satisfaction of their debts. *Michael v. Moore*, 462.

8. *Judicial Sales — Trustees — Commissions—Agreement—Subsequent Agreement—Interpretation of Contracts.*—In this case, *Held*, that a trustee of the funds arising from the sale of certain lands under judicial proceedings should not be entitled to certain commissions under an agreement entered into with the parties in interest, for the reason that these commissions were included under a certain other and subsequent agreement in a larger sum for his full services. *Henry v. Hilliard*, 572.

9. *Judicial Sales — Trustees — Commissions—Agreement—Report —Interpretation of Contracts.*—An agreement entered into by the parties and a trustee appointed by the court to hold and disburse the proceeds of sale of lands under judicial proceedings, which specifies that the report of the trustee "is considered as correct as to all debts and credits that have passed through his hands, except as modified by this agreement," does not authorize a commission claimed by the trustee in his report which the agreement itself includes in a larger amount for full commissions which are to be paid him. *Ibid.*

10. *Judicial Sales—Trustees—Order of Court—Disbursements in Excess.*—A trustee appointed by the court in judicial proceedings to hold and disburse moneys arising from the sale of lands is not entitled to a credit of a larger amount paid to certain parties in interest than ascertained and fixed by an order in the case made by the court, as a payment in excess of that sum is made without authority. *Ibid.*

ULTRA VIRES. See Corporations, 1, 3.

USURY.

1. *Usury — Furniture — Misdemeanor — Debtor and Creditors—Classification—Constitutional Law.*—Our Legislature has the power under its police regulations to make the taking of usury on household and kitchen furniture a criminal offense, and the right of classification, in the enforcement of proper police regulations on this subject, is referred, very largely, to the legislative discretion. *S. v. Davis*, 648.

2. *Same.*—Revisal, sec. 3712 (a), which makes it a misdemeanor for "any person, firm, or corporation" to loan money "by note, chattel mortgage, conditional sale, or otherwise, upon any article of household or kitchen furniture," at a greater rate of interest "than 6 per cent before or after such interest shall accrue, etc.," is a classification on a reasonable ground, and not an arbitrary selection, and therefore not objectionable as an unlawful division of money-lenders into two classes within the intent and meaning of the fourteenth amendment of the Federal Constitution. *Ibid.*

3. *Same—Interpretation of Statutes—Usury Charged or Reserved.* It was proven that the defendant, indicted under Revisal, sec. 3712 (a), made a loan of $10, taking a note for $16.75, secured by a mortgage on household and kitchen furniture, worth at least $25: *Held*, under the language of our statute, the charge of the usurious interest constituted the offense without the necessity of having received it; and under the facts of this case an usurious rate of interest for the period of the loan, to wit, $1.75, was actually reserved. *Ibid.*

VAGRANTS. See Constitutional Law, 11, 13.

VALUABLE PAPERS. See Wills, 9.

VENDOR AND VENDEE. See Deeds and Conveyances.

Liens—Conditional Sale—Reservation of Title—Realty—Registration.—Goods sold under a contract reserving title in the vendor, which are attached to the realty, become realty except as between the parties, but not as against others who have acquired a lien for labor and material before the registration of the conditional sale. *Fulp v. Power Co.*, 157.

VERDICT. See Judgment, 6.

VERDICT, DIRECTING. See Evidence, 42, 72, 96; Questions of Law.

VESTED RIGHTS. See Constitutional Law, 7; Parent and Child.

WAGERING CONTRACTS. See Contracts, 44.

WAIVER.

1. *Carriers of Goods—Contract Against Negligence—Waiver.*—A stipulation in a carrier's live-stock bill of lading which arbitrarily fixes a maximum valuation of the stock shipped and recoverable thereunder, without examination of the stock or any *bona fide* effort to arrive at their true value, is, to the extent that it is inadequate, a contract against the consequence of the negligent acts of the carrier, and invalid; and the acts of the consignor in making the shipment under a bill of lading of this character will not be construed as a waiver of the effect of the negligent acts of the carrier inflicting injury to the stock. *Harden v. R. R.*, 238.

2. *Principal and Agent—Misappropriation—Notice—Waiver.*—An owner of stock in a corporation, which subsequently proved to be valueless, requested D, the secretary of the corporation, and W, who had charge of the certificates, to sell it for him, which they undertook to do, with the understanding that the transaction was to be for cash. It proved that cash could not be obtained, and acting for the best interests of the principal, the agents negotiated a sale, which resulted in D giving his note for the full face value of the stock and taking a transfer of the certificates to himself, upon which the plaintiff still owed a large balance. The note thus taken was sent to the principal, who after the corporation had gone into a receiver's hands, instructed the agent to prove his claim against it, which he did. Thereafter he instituted this action upon the note, after the maker had become insolvent, against him and the other agent, alleging, as to both, excess of authority and a fraudulent misappropriation of funds, etc.: *Held*, the plaintiff could only recover upon the note, as it appeared that he was benefited by the transaction, being released from his stock subscription, and the circumstances were such as to put a prudent man upon notice that the stock had not been sold for cash, and further, that his subsequent conduct was a ratification of the act of his agents, which released them from liability. *Osborne v. Durham*, 262.

3. *Attorney and Client—Principal and Agent—Waiver of Client's Rights—Ratification—Estoppel.*—As a general rule, an attorney cannot waive any of the substantial rights of his client without the latter's consent, and he is not bound by the attempted waiver, unless there be a ratification, or something which amounts to an estoppel. *Hall v. Presnell*, 290.

4. *Insurance—Policy—Procurement by Fraud—Waiver—Measure of Damages.*—The principles heretofore decided in *Wilson's*

WAIVER—*Continued.*

case, 155 N. C., 173, and that line of cases, control the decision in this case upon the questions of the procurement by false and fraudulent representations by the agent of the insurer of the taking out of a life insurance policy, or a waiver by the insured, and the measure of damages. *Groves v. Insurance Co.*, 563.

5. *Reference — Exceptions Abandoned Below — Waiver.*—Exceptions to a referee's report abandoned before the trial judge are deemed as waived on appeal. *Church v. Dawson*, 566.

WARNINGS. See Negligence, 22, 38.

WARRANTY, BREACH OF. See Deeds and Conveyances, 1.

WATER AND WATER-COURSES.

1. *Streams—Water Supply—Pollution—Indictment—Language of Statute.*—The offense of unlawfully polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), is sufficiently charged in the indictment, when the language of the statute is followed therein. *S. v. Leeper*, 146 N. C., 655, cited and applied. *S. v. Corbin*, 619.

2. *Streams — Water Supply — Pollution—Conviction—Motion in Arrest—Bill of Particulars—Procedure.*—Upon a charge and conviction for polluting a stream from which a water supply is taken, etc. (Revisal, sec. 3862), a motion made in arrest of judgment upon the ground that it was not made to appear which stream the prisoner was charged with polluting, will not be sustained, the proper procedure being upon motion for a bill of particulars (Revisal, sec. 3244). *Ibid.*

WATERWORKS. See Bond Issues, 5, 6; Cities and Towns, 6.

WILLS. See Estates, 2, 3.

1. *Wills—Devises — Defeasible Fee — Deeds and Conveyances—Purchase.*—A testator bequeathed certain personalty to several named beneficiaries, as to each specifying, "to him and his lawful heirs begotten of his body, dying without such, to return" to certain designated persons "or their lawful heirs"; and also devised and bequeathed "the balance of my land and negroes to be equally divided between" J., C., and T., with provision that if "they all should die without such heirs, to return to my brother and sister": *Held*, J., C., and T. took a defeasible fee in the land, determinable at their death without lawful issue, and could convey no greater interest therein. *Maynard v. Sears*, 1.

WILLS—*Continued.*

2. *Wills—Devises—Defeasible Fee—Life Estate—Limitations of Actions.*—A devise of lands terminable upon the death of the devisee "without lawful issue" is a life estate upon the happening of the contingent defeasible event, and the statute of limitations does not begin to run against the remainderman in fee until the life estate falls in. *Ibid.*

3. *Wills—Devises—Defeasible Fee—Devisor's Title—Identification—Evidence.*—In an action brought by the heir at law of the remainderman to recover lands devised to his ancestor, evidence is sufficient as tending to show that the title to the lands in dispute was in the devisor, when the will itself shows he claimed the fee, and the testimony of a witness was that when he first knew the lands he was about five or six years old and the devisor cultivated them, and that the description of the lands in the will embraced the *locus in quo*, which he identified and described, and that upon the death of the devisor the devisee took possession of and cultivated the land, and stated that his title was "only good for life," with other evidence that there was a defect of the fee-simple title in him. *Ibid.*

4. *Wills—Trusts and Trustees—Equitable Estates—Execution of Trusts—Dower—Demurrer.*—The widow is not entitled to dower in an equitable interest in lands of her husband, which is subject to certain trusts and charges, until they are satisfied; and, hence, unless it appears in the widow's proceedings for dower that they have been satisfied, a demurrer thereto will be sustained. *Phifer v. Phifer*, 221.

5. *Same.*—A testatrix who had received a life estate from her father in a certain amount, with limitation over to her children, by her will declared that advances had been made from the trust estate to two of the children, R being one of them, and, subject to the debts of the testatrix and to these advances, the said amount was to be equally divided among her children. It also appeared from the will that a part of the trust property had been given in part payment of a certain tract of land which the owner had contracted to convey to her. The widow of R claiming dower in certain of the lands, without allegation in the petition as to what had been done under the will, or that the trusts had been closed: *Held*, neither R nor his widow could have an estate in possession until these trusts and charges were satisfied, and that the widow of R consequently was not entitled to dower upon the face of the petition, and hence a demurrer thereto should be sustained. *Ibid.*

WILLS—*Continued.*

6. *Same—Active Trusts—Account.*—A will declaring a life estate in one of certain trustees, with a limitation over to the children of testatrix after discharging certain debts and the execution of certain trusts, declares an active trust, and vests no estate in the children until the execution of the trusts; but a mere right to have the trusts executed and the accounts stated, and there would, until then, be no seizin in one of the children of lands from which his widow's dower could be assigned. *Ibid.*

7. *Dower—Equitable Estates—Seizin of Husband—Personalty—Trusts and Trustees — Advancements — Distribution.* — An estate in lands of a deceased husband from which his widow's dower may be assigned, whether legal or equitable, must be one of which the husband was seized. *Semble*, in this case, the will should be construed that the land be sold and the proceeds divided, and therefore the interest of the husband would be personalty; that advancement had been made to the husband of more than his share of the fund; that the trustees were to divide the fund after certain children had been made to account for advancements, and *Patton v. Patton*, 60 N. C., 574, applied. *Ibid.*

8. *Estates for Life—Personalty—Takers in Succession—Investments—Interest—Specific Bequests—Executors and Administrators.*—When the beneficiaries of a residuary bequest of personal property are to enjoy it in succession, the court, as a general rule, will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder; but when the bequest is specific and is not of the residue, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman. *Simmons v. Fleming*, 389.

9. *Wills, Holographic—"Valuable Papers and Effects"—Interpretation of Statutes.*—The statute as to a holographic will requires that the paper must have been found "among the valuable papers *and* effects of the deceased" (Revisal, sec. 3127). The substitution, in the Revised Code, of the word "and" for the word "or," was not intended to make any substantial change in the law, and the word "and" should be construed as "or." *In re Jenkins*, 429.

10. *Same—Policies of Insurance.*—The word "effects," as used by Revisal, sec. 3127, includes policies of fire insurance within its meaning. *Ibid.*

WILLS—*Continued.*

11. *Wills, Holographic—Interpretation—Construed Strictly—Expressed Purpose—"Valuable Papers and Effects"—Interpretation of Statutes.*—While the statute relating to holographic wills is mandatory and is to be construed strictly with reference to its requirements, it will not be so rigidly enforced as to defeat its clearly expressed purpose, and it is sufficiently complied with as to the place where the script must be found to constitute a valid will, if it is found among the valuable papers and effects of the deceased, under such circumstances as to show that he regarded it as a valuable paper worthy of preservation and desired it to take effect as his will. *Hughes v. Smith*, 64 N. C., 493, cited and applied. *Ibid.*

12. *Wills, Holographic—"Valuable Papers and Effects"—Comparative Values—Interpretation of Statutes.*—The statutory requirement that the script must be found "among the valuable papers and effects" of the deceased to constitute a valid holographic will, does not mean that the "papers and effects" must be the most valuable, for such would be uncertain of ascertainment and likely to vary with the changing condition of the affairs of the deceased, and to depend upon his condition in life and business habits, and confusing in the event the deceased had more than one place of deposit for them. *Ibid.*

3. *Wills, Holographic—Valuable Papers and Effects—Depository—"Found"—Presumptions—Interpretation of Statutes.*—The fact that a holographic will is found among the "valuable papers and effects" of the deceased implies that it was placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will. *Ibid.*

14. *Same.*—The statute requires proof that the script was *found* among the "valuable papers and effects of the deceased" to be valid as a holographic will, not that it was personally placed there by the author, and proof that the paper was thus found is sufficient in the absence of countervailing evidence. *Ibid.*

15. *Same—Evidence—Nonsuit.*—The deceased, whose holographic will is caveated, had several places of deposit for his "valuable papers and effects"—his desk in his store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. There was evidence tending to show that after several weeks of unavailing search after his death, a script written by him and sufficient as his holographic will was found in the hall table drawer, which was little used, with his policies of fire insurance, all of which had expired but one, in a package marked "Important," in his own hand-

WILLS—*Continued.*

writing: *Held,* a motion for judgment of nonsuit upon the evidence should be overruled which was based upon the ground that there was no evidence that the holographic will had been found among "the valuable papers and effects" of the deceased. *Ibid.*

16. *Same—Instructions.*—Upon the evidence in this case it was proper for the trial judge to instruct the jury that if they found that the deceased placed the script in an envelope, with certain policies of fire insurance, and deposited them in a drawer of the table in the hall of his home, intending that it should be his will, the requirements of the statute were fully observed. *Ibid.*

WITNESS. See Evidence, 4, 41, 109.

WORDS AND PHRASES.

Slander — Intent — Evidence — Larceny — "Took" and "Stole"— Words and Phrases—Unequivocal Terms—Burden of Proof— Questions for Jury.—In an action for damages for slanderous words spoken by defendant of plaintiff, the evidence for plaintiff tended only to show that defendant on several occasions had said to others that his brother had caught the plaintiff "taking some pokes of cotton out of his patch the night before," which he (the defendant) believed to be true; that on another occasion the plaintiff and defendant were together with the purpose of the latter to "make up the trouble," the former denying that he had taken the cotton, the latter insisting that he had, from the information his brother had given: *Held,* the evidence was not an unequivocal statement that plaintiff had stolen the cotton, and being capable of a different construction, was properly submitted to the jury, with the burden of proof on the plaintiff to show whether the words, in view of the circumstances under which they were used, naturally imported that the plaintiff had stolen the cotton, and whether defendant so intended to state. *Fields v. Bynum,* 156 N. C., 413, cited and distinguished. *McCall v. Sustair,* 179.

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